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Supreme Court, U.S.
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No. 93-_____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1993

ALTO-SHAAM, INC.

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Did the Court of Appeals fail to make a fair assessment of the record when it relied on its standard of review as cited in N.L.R.B. v. Augusta Bakery Corp., 957 F.2d 1467 (7th Cir. 1992) thus applying an erroneous standard of review or grossly misapplied the correct standard of review set forth in Universal Camera Corp. v. N.L.R.B., 360 U.S. 474 (1951) and should such court conform to the standard mandated by the Supreme Court?
2. May the Court of Appeals ignore the admitted disrespect, foul, filthy and opprobrious language used toward a company representative when it approved the fashioning of a remedy and may the court thus aid in granting an order of reinstatement which is a patent attempt to achieve ends other than those which can fairly be said to effectuate the policies of the Act?
3. May the court fail to take into consideration an estimate of the worth of the testimony of witnesses as required in other circuits?

PARTIES IN COURT BELOW

The parties are the same as in the Court of Appeals for the Seventh Circuit.

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Petitioner Alto-Shaam, Inc. respectfully prays that a writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit, entered in the above proceeding on June 14, 1993.

OPINION BELOW

The unpublished opinion of the Court of Appeals for the Seventh Circuit was entered on June 14, 1993 and is reprinted in Appendix A to this Petiiton. (A. Ap 85 and 86).

JURISDICTION

The decision of the Court of Appeals was entered on June 14, 1993. This Court's jurisdiction is invoked pursuant to 29 USCS sec. 160(e) and 28 USCS sec. 1254.

STATUTES INVOLVED

Title 29 - Labor; Chapter 7, Labor Management Relations National Labor Relations 29 U.S.C.S. sec. 160 et. seq, attached in relevant part as Appendix B to this petition. (A. App. pp 143-146).

STATEMENT OF THE CASE

This matter commenced with an unfair labor charge filed on July 24, 1990, by the United Steelworkers of America, AFL-CIO-CLC (herein the "Union" against Alto-Shaam, Inc., a manufacturer of commercial restaurant equipment located in Menomonee Falls, Wisconsin (herein the "Company" or "Respondent"). A complaint was issued on September 5, 1990, alleging that Respondent violated Section 8(a) (3) and (1) of the National Labor Relations Act, as amended, alleging that the Company twice terminated employee Kristeen Peckstein, and terminated employees James Jaeger and Scott Westfahl, because the named employees joined, supported or assisted the Union and engaged in concerted activities for the purpose of collective bargaining or the mutual aid or protection and in

order to discourage employees from engaging in such activites for the purpose of collective bargaining or other mutual aid or protection.

The Company answered denying the alleged unfair labor practices and affirmatively alleging that the Company initially terminated Peckstein upon demand by the Union for failure to pay dues, and that the three employees discharged engaged in unprotected strike misconduct; further, that the allegations of the Complaint should be referred to arbitration under the Collyer doctrine. Other assertions made by way of affirmative and other defense were stricken by the order dated February 22, 1990, of Associate Chief Administrative Law Judge John M. Dyer on motion of General Counsel.

In June of 1989, the Union demanded the discharge of four employees, including Peckstein and Doreen Held, for non-payment of dues. Scott Westfahl was not one of the four whose discharge was demanded. Respondent refused to terminate the employees. While the matter was pending before an arbitrator pursuant to the parties collective bargaining agreement, the Union commenced (on July 2, 1992) an economic strike (Tr. pp. 194-200).

Peckstein, Hlavenka and Owens, each of whose discharge was demanded, joined the picket line; Held did not. Held crossed the picket line and continued to work (Tr. p. 326).

By letter dated July 3, 1990, the Company discharged Owens, Peckstein and Hlavenka, informing them that it was accepting the Union's demands and terminating each of them (Tr. pp. 194-200). Held did not receive such a letter (Tr. p. 332).

On Friday, July 6, 1990, employees Peckstein, Depies and Westfahl went to the home of Held (Tr. p. 330). The home is in Hustisford, several miles from the plant and the picket line (Tr. p. 90). Held told them she did not want any trouble, but she allowed them in her home (Tr. p. 331). During the conversation in the home, Held alleged that Peckstein made the statement: "If you valued your life", which statement frightened her (Tr. p. 333). She called Debra Zimmerman, a Company supervisor, and Greg Lamondo, Plant Superintendent, who told her to call the police (Tr. p. 335). She did call the police, was interviewed by the police, and left home for the weekend (Tr. p. 334).

While the three named above were at the Held

home, Peckstein did most of the talking (Tr. p. 340); however, all of the people at Held's house were involved in the conversation which included asking Held to honor the picket line, and asking about the company's offer to the employees, and whether she had received the same termination letter (Tr. p. 70). Westfahl stated that Held should fight with us (Tr. p. 75). All three talked about having Held join them (Tr. p. 80).

About two hours before arriving at the Held home, Peckstein, Depies and Scott Westfahl were involved in a conversation about Peckstein's discharge which included whether Held had received the same termination letter as Peckstein (Tr. p. 77).

When the three arrived at the Held home, Held was afraid the three were going to harm her (Tr. p. 80). Held said: I do not want to fight with you guys (Tr. p. 91).

On July 13, 1990, it was reported to Company President Jerry Maahs that there was some physical threatening at an individual's house; that there were apparently three people that went to the house (Held); that Held was quite upset and was crying, and having called in, was advised to stay home because of the

threats by Ms. Peckstein and some other people (Tr. p. 27). Peckstein was terminated for serious strike misconduct for making some kind of threat to Ms. Held; Westfahl was terminated on the factual basis that he was one of the people that was involved in the incident when the threat occurred (Tr. p. 30).

Employee James Jaeger at the time of the July, 1990, strike participated in the strike (Tr. p. 95). He knew fellow employee Steve Maahs, Alto-Shaam's president's son (Tr. p. 95).

Jaeger testified that on July 2, 1990, Steve Maahs hit him with his car. He further testified that at approximately 5:00 p.m. there was a long line of cars, people waiting; that Steve got into his car and started heading toward the picketers; he accelerated and he hit me. He was about fifty feet away from him when Jaeger first noticed him (Tr. p. 96).

Jaeger further testified he did not immediately get out of the way because he assumed Maahs would slow down or come to a stop with people in the line (Tr. pp. 96-97). He testified that the car hit his right leg and foot as it went by (Tr. p. 99). He estimated the speed of the car at twenty-five miles per hour.

Jaeger claimed Maahs did not get in the line of

cars waiting to exit (Tr. p. 100). He was not seriously injured (Tr. p. 100).

Jaeger made out a police report involving the incident (Tr. p. 100). The report contains a statement that he thought the act of hitting him was intentional.

President Jerry Maahs became aware of the incident when a policeman from the Menomonee Falls Police Department showed up at the corporate offices looking for Steve Maahs (Tr. pp. 32-33). Jerry Maahs was in the lunchroom when the policeman called him out and informed him that his son was accused by Jaeger of striking him while Jaeger was on the picket line (Tr. p. 33).

Jaeger was discharged for serious strike misconduct, which consisted of the false allegation that Steve Maahs had intentionally struck him with his car; part of it was pounding on Steve's car and various other things that happened at that particular time (Tr. p. 35).

Jerry Maahs was aware that the police investigated the allegations made by Jaeger concerning his son (Tr. p. 37). He was not aware that the police had refused to prosecute Jaeger; he had information given him that because of the false

accusation that any recourse his son would have must be through the civil courts (Tr. p. 38).

Deputy Sheriff Paul Renkas testified he arrived at the Alto-Shaam premises at 4:30 p.m., having been assigned to the premises under direction of the Sheriff of Waukesha County, which directive flowed down through his shift lieutenant. The basic summary of the assignment was to keep the peace at a strike line that was in existence at the Alto-Shaam property on Water Street in Menomonee Falls, (Tr. p. 208). The assignment was to protect the property of the Alto-Shaam Company and to protect the people, including strikers and workers (Tr. p. 209).

The cars started to line up at ten to 5:00 p.m.: that is when the factory started letting out (Tr. p. 216). The other deputy and Renkas lined up the cars along the island facing east; all the cars were directly behind each other. The back of the cars were facing west (Tr. p. 218). There were no cars to the left of the line (Tr. p. 219). It was coordinated so that all the vehicles would leave only in single file in the same area (Tr. p. 219).

The Maahs' car was not the first to leave the driveway (Tr. p. 220). One or two cars left the

driveway before the Maahs car (Tr. p. 221). Maahs' car's speed as it left was less than five miles an hour (Tr. p. 222). The Maahs car had come to a stop before leaving the driveway (Tr. p. 224). There were no other officers there that day (Tr. p. 225).

There were about twenty strikers there (Tr. p. 226). The strikers stretched all the way across from one point to the other point; they completely blocked any type of access in or out between the points (Tr. p. 227).

There was a lot of profanity being used by the strikers: you cock sucker, sons of bitches, scabs, mother fuckers. Some of the strikers were describing sexual acts as far as performing them on their bosses; sucking ass was another profanity that was used. The type of threats were basically: I am going to get you; you just wait until we come back to work (Tr. p. 228).

Renkas' attention was drawn to Jaeger because he was the only person standing south of the cars waiting to pass through (Tr. p. 228). The deputies permitted the first car through; then the second car, or third car, came through: a silver Monte Carlo SS (Tr. p. 229).

Renkas saw Jaeger surge toward the car. He

heard some type of contact and then heard Jaeger screaming violently (Tr. p. 229).

Renkas saw Jaeger surge towards the car; he thought Jaeger was just going to yell at somebody. The speed of the Maahs car was under three miles an hour (Tr. p. 230).

The sound was a second from the surge. Renkas testified that from his training and experience he would have to say it was the contact of Jaeger's body against the car (Tr. p. 232). Renkas did not see any part of the body make contact with the car (Tr. p. 233).

Renkas' curiosity was sparked: a person was jumping up and down holding his shin, screaming violently. He approached that subject and brought him over to his location (Tr. p. 236).

Jaeger had twisted away from the car in the direction of the island with a rotating motion (Tr. p. 237).

There were at least twelve other cars in line and Renkas caused that line of cars to stop (Tr. p. 238). Renkas began conducting an investigation (Tr. p. 239).

Jaeger said he had just been struck by an

individual Renkas did not know (Maahs). Renkas then told Glaser and a female to leave the area because he was conducting an investigation: otherwise they would be arrested for obstructing the investigation (Tr. p. 240).

Renkas asked Jaeger what had happened. Jaeger said he had been struck by Steve Maahs who, he said, was the boss' son. He was asked what kind of car struck him and Jaeger replied it was either a gray or silver Monte Carlo SS. He did not get a plate number. Renkas asked him what the extent of his injuries were, or what had happened, and he said he got struck by the bumper of the car, the back bumper of the car (Tr. pp. 241-242).

Renkas asked him where the injury was and Jaeger told him it was on the top of his right foot. Jaeger was asked if he needed medical attention and Jaeger was unsure at that point, Renkas again asked him if he wanted medical attention or ambulance. His reponse was, again, unsure (Tr. p. 242).

Renkas informed Jaeger that he would accompany him to the hospital to find out if there were any injuries: if there were no signs of injuries, or, if the doctor could not diagnose any type of injury,

he could possibly be charged with obstruction of a police officer (Tr. p. 242).

Renkas again asked Jaeger if he wanted an ambulance or needed medical attention; the reply was no. Renkas then instructed Jaeger to let him see his right foot. Renkas visually observed his white tennis high top and there were no signs of any type of tampering besides normal wear and tear on the white part of the tennis shoe (Tr. p. 242).

Renkas told Jaeger to take off his tennis shoe; Jaeger did. Renkas looked at his tennis shoe and could not see any signs of blood or any tire marks, or black marks or scrapes (Tr. pp. 242-243).

Renkas then visually observed Jaeger's white sock which was still on his foot; could not see any tire impressions on the sock. Renkas visually observed Jaeger's right foot; there were no signs of contusions or swelling or redness at all except for a sweaty foot with impressions of cotton from the socks being on (Tr. p. 243) his foot.

The interview of Jaeger took approximately eight minutes. At that point, Glaser was about three feet behind Jaeger; during the entire colloquy between Renkas and Jaeger, in Renkas' opinion, Glaser had his

attention directed to the investigation (Tr. pp. 243-244).

At no time did Jaeger indicate he wanted to file a police report with Renkas personally.

On cross-examination: Renkas testified he wrote out a statement to the Menomonee Falls Police Department as a supplement to a Menomonee Falls officer's report (Tr. p. 250). It was about the incident between the Maahs car and Jaeger (Tr. p. 251). The report said Renkas heard a car accelerate behind him and a thump. Renkas stated: "I had expressed that it was my training experience. I didn't specifically say it was a thump." He testified he saw a surge towards the car and within a second, a thump (Tr. pp. 251-252).

The Menomonee Falls Police Department contacted Renkas about the incident. Renkas did not contact any top Alto-Shaam management about the incident because everyone was leaving at that time (Tr. pp. 256-257).

Renkas had no phone numbers of any management official at Alto-Shaam, and only knew one, Larry Kerski. He did not call Kerski (Tr. p. 257).

Renkas was paid for the day by Alto-Shaam at a wage agreed upon between the Sheriff and Alto-

Shaam, which sum was about equal to his regular salary (Tr. p. 257).

Before the incident during which Renkas heard the acceleration and the thump, he was trying to keep everyone safe, trying to keep a lot of the foul language down because there were children present, trying to keep traffic stopped, doing traffic control, trying to keep the crowd from entering into traffic, either from the employees leaving the lot or from Water Street, and was watching for any type of physical violence between the strikers and the workers (Tr. p. 259).

Renkas told Peckstein several times that she should stop the abusive language or he was going to arrest her for disorderly conduct. He also told other members and Glaser that if the obscenities didn't stop, and if people didn't stop using physical suggestions or gestures, he would arrest everyone in the strike line and sort it out later (Tr. pp. 259-260).

During the course of Renkas' conversation with Jaeger about being hit by the Maahs car, Jaeger had two stories. The first was: he had been struck by the bumper of the car, but he didn't tell Renkas exactly where; his second story was that his foot got run over by the tire of the Maahs car (Tr. p. 273).

During the course of the investigation, Renkas explained to Jaeger he would be accompanying him to the hospital and that if there were no signs of injuries, or they did not diagnose any signs of injuries, that Renkas would cite Jaeger with obstruction of a police officer; he than explained to him what obstruction of a police officer meant (Tr. p. 274).

Renkas told Jaeger he, Jaeger, had given two different stories and they both can't be right; that obstruction of a police officer is normally involved in giving a police officer false information; and he could either be charged by the state or by the county (Tr. p. 274).

Renkas was asked by Attorney Steinle as to whether or not he formed an opinion as to whether or not there actually had been contact between the body of Jaeger and the automobile of Maahs, and "at that time" did you form an opinion as to whether or not the incident took place as he (Jaeger) was reciting to you?" Jodge Roth sustained an object to the question (Tr. p. 274). Mr. Steinle then made an offer of proof as follows:

> "Q. In other words, did you have an opinion as to whether or not an accident really happened".

"A. I did.

"Q. And what was your opinion?

"A. After looking for any signs of injuries or contact, my professional opinion was that no injuries or no accident had occurred."

The offer of proof was rejected by Judge Roth (Tr. p. 277).

Karen Lindberg, who was marketing director for Alto-Shaam at the time of the strike, testified that she was about to leave the company parking lot on July 2, 1990, and was the first car in line; she was stopped for two minutes and told by the police officer to just wait (Tr. p. 378). She testified that Steve Maahs' car was directly behind her (Tr. p. 385). She had been warned that in prior strikes strikers were heard to claim they had been hit by someone's car and they had injuries (Tr. p. 383).

Rene Conrad, a former employee of Alto-Shaam testified she was the driver of the car immediately behind Steve Maahs and was stopped for a couple of minutes while the strikers paraded in front of the car; then the strikers stopped (Tr. p. 391).

Conrad further testifid that the car in front of her proceeded very slowly to go on Water Street, as he

was turning, one of the strikers apparently leaned himself into the car, faking an accident is what it was (Tr. p. 393). Her recollection of the incident is that the striker threw himself into the car and not on the car (Tr. p. 398).

Conrad's affidavit appears in the transcript at page 401, and recites, among other things: "as he was turning right to go on the street, the guy who said he got hit threw himself on Steve's car. Steve didn't hit him. There was room if he didn't throw himself into the car. Then he grabbed his leg. He was obviously phony." (Tr. p. 491).

On July 16, 1990, Jaeger returned to Alto-Shaam, the strike having ended (Tr. p. 103). On that date, Jaeger had a conversation with Schalow which turned into an incident.

When Jaeger reported for work, he was looking for his time card, and Plant Superintendent Lamondo was there and asked if he could help Jaeger? Jaeger responded he was looking for his time card and Lamondo told him he was no longer employed by this company. Jaeger asked Lamondo why not, and Lamondo responded: "because I said so". (Tr. p. 103).

Lamondo asked him if he would like to talk to

Jim Schalow and Jaeger said yes (Tr. p. 103). Jaeger waited for about fifteen minutes. Lamondo returned with Schalow and two deputy sheriffs. Jaeger ended up calling Schalow a "fat fucking pig", at which time he was asked to leave (Tr. p. 104).

Deputy Sheriff James P. Materna testified he was at Alto-Shaam from July 2, 1990, to July 16, 1990, to basically keep the peace between the parties (Tr. p. 357). Materna was called to the area known as Greg Lamondo's office. Materna's partner, Deputy Gerr, Jaeger and maybe approximately four or five other people were in the room (Tr. pp. 358-359).

Schalow stated to Jaeger that he was fired. Schalow stated this to Jaeger at least three times and Schalow requested him to leave. At one point — in fact, the last time, Schalow spelled out the word "fired" to him, and Jaeger stated in no way was he going to leave. He referred to Schalow as a "fat fucking pig", and at this point, Deputy Materna and his partner told Jaeger he should leave (Tr. pp. 360-361).

Jaeger then got up from his seat and lunged at Schalow with one of his hands towards Schalow's throat. At that point, Materna and his partner

grabbed Jaeger by the arms. Jaeger was told it was time to leave. All during this episode, Jaeger was extremely abusive, verbally abusive to the deputies, saying you can't do this. Jaeger attempted to break away from the deputies. Jaeger was then informed he was under arrest for disorderly conduct. He was handcuffed and searched. The deputies requested one of the parties in the office to contact the Menomonee Falls Police Department and to respond to Alto-Shaam and take Jaeger (Tr. p. 361).

When Jaeger got up, he was swearing at Schalow. He said, "I am not leaving until I am ready to leave". At this point, he did lunge forward, in a forward motion toward Schalow. Schalow did have to back up. At that point, I did grab Jaeger's arm and my partner grabbed Jaeger's other arm (Tr. p. 364).

Jaeger continuously struggled with the deputies, calling them "fucking pigs" (Tr. p. 365).

Jaeger got about two feet from Schalow's throat before Materna and his partner intercepted him (Tr. p. 366).

Jaeger was given a citation for disorderly conduct and was found guilty under the Menomonee Falls laws stating that anyone who is loud or

boisterous in a public or private place can be charged with disorderly conduct. He was fined $85.00 (Tr. p. 105).

The charge before the National Labor Relations Board was filed on July 24, 1990, by United Steelworkers of America, AFL-CIO-CLC. The complaint was issued September 5, 1990, and alleged that Alto-Shaam, Inc. violated Section 8(a) (3) and (1) of the National Labor Relations Act. The Company's Answer denies the commission of the alleged unfair labor practices, and affirmatively alleged in sum that: (1) the Company initially terminated Peckstein upon demand by the Union, for failure to pay dues; (2) the three employees engaged in unprotected strike misconduct; and (3) the allegations of the complaint should be referred to arbitration under the Collyer doctrine. On motion of General Counsel, other assertions made by way of affirmative defense were stricken by order of Associated Chief Administrative Law Judge John M. Dyer dated February 22, 1991.

The case was heard at Milwaukee, Wisconsin, on March 7 and 8, 1991, before Marvin Roth, Administrative Law Judge. On May 22, 1991, Judge Roth issued his decisio and concluded that as

matters of law Alto-Shaam, Inc., is engaged in commerce within the meaning of the Act; the Union is a labor organization within the Act; the Company violated Section 8(a) (3) of the act by discriminatorily terminating and refusing to reinstate Kristeen Peckstein, Scott Westfahl and James Jaeger thereby discouraging membership in the Union; the Company violated Section 8 (a) (1) of the Act by interfering with, restraining and coercing its employees in the exercise of the rights guaranteed in Section 7 of the Act and is engaging in unfair labor practices affecting commerce within the meaning of Section 2 (6) and (7) of the Act.

The recommended remedy was reinstatement with back pay.

Alto-Shaam, Inc. filed exceptions and a brief in support of exceptions on June 19, 1991.

On July 24, 1992, after proceedings before the Board, the Board stated its findings of fact and conclusions of law, and issued an Order directed to Alto-Shaam, Inc., in Case No. 30-CA-11019, which Order reversed the ALJ's Order to reinstate Peckstein and affirmed the Order as to the reinstatement of Westfahl and Jaeger with back pay.

The National Labor Relations Board applied to

the Court of Appeals for an enforcement order. Alto-Shaam, Inc. answered and petitioned for review of the Order of the Board. The Court of Appeals ordered the enforcement of the Board's Order.

REASONS FOR ALLOWANCE OF THE WRIT

I. THE SEVENTH CIRCUIT FAILS TO FOLLOW THE MANDATE OF THE SUPREME COURT AS SET FORTH IN THE UNIVERSAL CAMERA CASE AND MANDATORILY FOLLOWED IN OTHER CIRCUITS AND SUBSTITUTES A DIFFERENT STANDARD OF REVIEW OR MISAPPLIES THE CORRECT STANDARD OF REVIEW.

The judges of the Seventh Circuit acknowledge the standard of review is as set forth in Universal Camera Corp. v. National Labor Relations Board, 340 U.S. 474 (1951), a case arising out of the 2nd Circuit, which contains the standard of review that is applicable for the review of Board decisions throughout the United States. In N.L.R.B. v. Augusta Bakery Corp., 957 F. 2d 1467 (7th Cir. 1992) at page 1471 the Seventh Circuit, based on Universal Camera, states this standard to be:

> "We must uphold the Board's determination if its factual findings are by substantial evidence in the record as a whole

and its legal conclusions have a reasonable basis in the law."

* * *

"It is the independent validity of the Board's order that is under review. The scope of our review is narrow; we must uphold the legal conclusions of the Board unless they are irrational or inconsistent with the National Labor Relations Act. (citations omitted) Additionally, we may not disturb the Board's remedial order unless it can be shown that the order is a patent attempt to achieve ends other than those which can fairly be said to effectuate the policies of the Act. (citations ommited)"

The Court concludes that the "faithful application of these principles requires a great deal of judicial restraint." In N.L.R.B. v. Augusta Bakery Corp., at page 1471, citing U.S. Marine Corp. v. N.L.R.B., 944 F.2d 1305 (7th Cir. 1991) at page 1314. Therein, the Court said:

"...We must accept as a 'given' the economic and social policy choices made by Congress in enacting the National Labor Relations Act. We must acknowledge that Congress has decided to vest primary responsibility for the implementation of that policy in the N.L.R.B. and not in this court."

Primary responsibility yes, but Universal

Camera makes it clear that the appeals courts are not to abdicate their judicial responsibility once the Board has spoken. In Universal Camera, 340 U.S. 474 at pages 478 and 479, Justice Frankfurter, for the Court, in discussing the review of the record before the Board in isolation and thus substantiating the Board's findings was improper and led to:

> "Protests against 'shocking injustices' and intimidations of judicial 'abdication' which some courts granted enforcement of the Board's orders stimulated pressures for legislative relief from alleged administrative excesses."

Frankfurter went on to say (at 340 U.S. p. 483 and 484) that Congress expressed disapproval of the manner in which the courts were applying their own standard of judicial restraint.

Congress set the standard of proof of "substantiality of evidence" which must take into account whatever in the record detracts from the weight of the evidence supporting a Board decision.

The standard enunciated in the case at bar is:

> "We respect fact findings made by the National Labor Relations Board if they are supported by sustantial evidence on the record as a whole.," and

> "In this case, the record as a whole amply supports the Board's findings that James Jaeger and Scott Westfahl did not engage in strike misconduct that justifies any denial of reinstatement."

which only takes into account what the Supreme Court says is insufficient, the one sided story presented by the parties (Jaeger and Westfahl) who both commited criminal acts during the strike.

Thus, certiorari should be granted so the standard of review of the Seventh Circuit be brought into conformity with the standard required in the second and sixth circuits (as also stated in N.L.R.B. v. Pittsburgh S.S. Co., 340 U.S. 498, 1951). Any misapprehension as to what Universal Camera mandates, or how the Seventh Circuit is misapplying such mandate must be corrected. All of the circuits should be in conformity with a National Act.

II. THE COURT OF APPEALS FAILED TO TAKE INTO CONSIDERATION THE DISRESPECTFUL, FOUL, FILTHY AND OPPROBRIOUS LANGUAGE USED TOWARD A COMPANY REPRESENTATIVE WHEN IT APPROVED THE FASHIONING OF A REMEDY.

The June 14, 1993 decision in the instant case

lacks conformity with the national standards in that it fails to address the reinstatement problems presented by the undisputed conduct of Jaeger after the strike had ended and Jaeger appeared at the Alto-Shaam plant ostensibly to report to work. It is undisputed that Jaeger used filthy, foul and opprobrious language toward a company labor representative violative of the prohibition set forth in Sullair P.T.O., Inc. v. N.L.R.B., 641 F.2d 500 (7th Cir. 1981). Any conclusion of law supporting reinstatement must then fail because it lacks a reasonable basis in law as required to be applied under the Universal Camera doctrine.

There can be no doubt that regardless of what Jaeger's conduct consisted of (including an arrest and conviction for disorderly conduct on company premises) the Administrative Law Judge and the Board wished to achieve the end result of Jaeger's reinstatement with back pay.

The Seventh Circuit has noted in U.S. Marine Corp. v. N.L.R.B. 944 F.2d 1305 (7th Cir. 1991):

> "We must remember that Congress has charged the Board with "the task of devising remedies to affectuate the policies of the Act. (citations omitted)

and then adds:

> "Courts may not disturb the Board's remedial order 'unless it can be shown the order is a patent attempt to achieve ends other than those which can fairly be said to effectuate the policies of the Act'."

In the instant case, the court acknowledges that this is the prevailing law but refuses to either discuss the legal conclusion (reinstatement) or grossly misapplies the law to the facts. Thus, in concert with the Board it is possible that ends are achieved totally inconsistent with and irrational with effectuating harmonious labor relations consistent with the Act. This conduct is prohibited in N.L.R.B. v. Transport Service Co., 973 F.2d 562 (7th Cir. 1992).

Certiorari should be granted both to correct the gross misapplication of the law as applied herein and to set forth a standard on remedial reinstatement consistent with fair play and the law.

III. MAY THE COURT FAIL TO TAKE INTO CONSIDERATION AN ESTIMATE OF THE WORTH OF THE TESTIMONY OF WITNESSES AS REQUIRED IN OTHER CIRCUIT COURTS?

The only disputed action taken by Jaeger was the attempt by Jaeger to lunge at Schalow. Jaeger

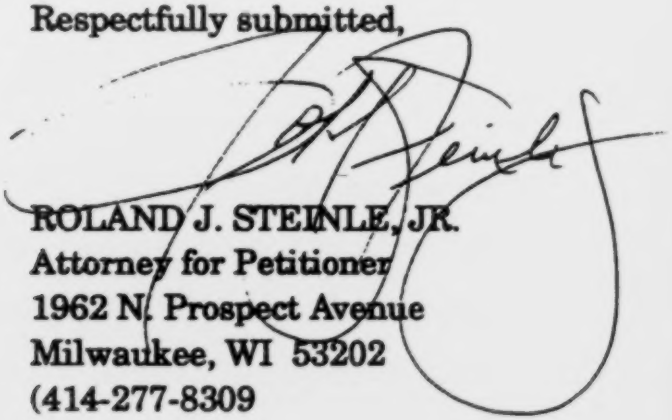
claimed he was reaching for the door and the deputy sheriffs claimed an aggressive act. The ALJ credited Jaeger and discredited the deputy. The Court of Appeals abdicated its responsibility to evaluate the worth of the testimony of the witnesses as its duty is set forth in Universal Camera, supra.

CONCLUSION

For the reasons stated in the petition for a writ of certiorari to the United States Court of Appeals for the Seventh Circuit, the writ should be granted.

Dated at Milwaukee, Wisconsin, this 10th day of September, 1993.

Respectfully submitted,



ROLAND J. STEINLE, JR.
Attorney for Petitioner
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United States Court of Appeals
For the Seventh Circuit
Chicago, Illinois 60604
Argued March 31, 1993
June 14, 1993

Before
Hon. William J. Bauer, Chief Judge
Hon. Frank H. Easterbrook, Circuit Judge
Hon. Thomas M. Reavley, Senior Circuit Judge

NATIONAL LABOR RELATIONS BOARD, Petitioner,		}Petition for Review }of an Order of the }National Labor
No. 92-3212	vs.	}Relations Board } 30 CA 11019

ALTO-SHAAM, INCORPORATED,
Respondent.

Order

Despite the protections of the National Labor Relations Act, 29 U.S.C. § 151, et. seq., companies may discharge employees who engage in "specific strike misconduct" if the companies can prove which employees participated. *NLRB v. Augusta Bakery Corp.*, 957 F.2d 1467, 1477 (7th Cir. 1992). But a "discharge is ..... unlawful if the evidence supports a finding that no misconduct occurred, notwithstanding

the employer's good faith belief that it did occur." *Id.* We respoect fact findings made by the National Labor Relations Board if they "are supported by substantial evidence on the record as a whole". *Id.* at 1471. In this case, the record as a whole amply supports the Board's findings that James Jaeger and Scott Westfahl did not engage in strike misconduct that justifies any denial of reinstatement.

ENFORCED.

"Of the Fifth Circuit, sitting by designation.

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

AGENCY JUDGMENT
With Oral Argument

Date: June 14, 1993

BEFORE: Honorable William J. Bauer
Chief Judge
Honorable Frank H. Easterbrook,
Circuit Judge
Honorable Thomas M. Reavley,
Senior Circuit Judge

No. 92-3212

NATIONAL LABOR RELATIONS BOARD
Petitioner

v.

ALTO-SHAAM, INCORPORATED,
Respondent

Application for Enforement of an order of the National Labor Relations Board No. 30-CA-11019

This cause was heard on the record from the National Labor Relations Board, and was argued by counsel.

On consideration whereof, IT IS ORDERED

AND ADJUGED by this Court that the decision of the National Labor Relations Board, is ENFORCED, with costs, in accordance with the decision of this court entered this date.

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* The Honorable Thomas M. Reavley, Senior Circuit Judge of the Fifth Circuit, is sitting by designation.

(1064-051993)

DOR

307 NLRB No. 216

D--2916
Menomonee Falls, WI

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

ALTO-SHAAM, INC.

and Case 30—CA—11019

UNITED STEELWORKERS OF AMERICA
AFL—CIO—CLC

DECISION AND ORDER

On May 22, 1991, Administrative Law Judge Marvin Roth issued the attached decision. The Respondent filed exceptions and a supporting brief. The General Counsel filed an answering brief to the Respondent's exceptions.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has

decided to affirm the judge's rulings. findings, [1] and conclusions only to the extent consistent with this

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[1]The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clean preponderance of all the relevant evidence convinces us that they are incorrect. _ Standard Dry Wall Products, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

The Respondent has excepted to the judge's finding in connection with the discharge of employee James Jaeger that off-duty deputy sheriffs employed and subject to direction by the Respondent cannot be considered impartial witnesses whose testimoney should be accorded special weight as law-enforcement personnel. The judge found that Deputy Sheriff Paul Renkas did not actually see the alleged collision on July 2, 1990, between Steve Maahs' car and Jaeger's leg and foot, about which he testified. Thus, as to that incident, Renkas' impartiality is not at issue. Deputy Sheriff James Materna was the only witness who testified that Jaeger engaged in threatening physical movements against the

(Footnote continued)

decision, [2] to modify the recommended remedy, and to adopt the recommended Order as modified.

The complaint alleges, inter alia, that the Respondent violated Section 8(a)(3) and (1) of the Act by twice terminating employee Kristeen Peckstein

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Respondent's labor consultant, James Schalow, on July 16, 1990. The judge noted that the Respondent did not present witnesses to corroborate Materna's account of the events, even though there were seven individuals present on July 16. Thus, the judge credited Jaeger's testimony that he did not physically threaten Schalow. Under these circumstances, we affirm the judge's credibility resolution and his conclusion that Jaeger was discriminatorily discharged and did not engage in conduct by which he forfeited his eligibility for reinstatement.

In addition, the Respondent has excepted to certain inferences drawn by the judge. It is the judge's duty as the trier of fact to decide whom to believe, to reconcile conflicting evident, and to draw reasonable inferences from the evidence in a case. Such inferences are entitled to deference if they are supported by substantial evidence on the record as a whole. Shattuck Denn Mining Corp. v. NLRB, 362 F.2d 446 (9th Cir. 1966). We find no basis in the record for rejecting the inferences draw by the judge.

2 We do not rely on the investigatory affidavit of employee Doreen Held The affidavit was offered, but was not admitted into evidence.

because of her union and other protected concerted activites. The judge found that the Respondent's first discharge of Peckstein was unlawful and ordered her reinstated with backpay from that date. The Respondent excepts. It contends that Peckstein's postdischarge threat against fellow employee Doreen Held during a July 6, 1990 visit to Held's home was sufficiently egregious to justify its refusal to reinstate Peckstein. We find merit in the Respondent's exception.

The relevant facts are as follows. In June 1989, the United Steelworkers of America (the Union) demanded the discharge of four employees, including Peckstein and employee Doreen Held, for nonpayment of dues. The Respondent refused. While the matter was pending before an arbitrator pursuant to the parties' collective-bargaining agreement, the Union commenced an economic strike against the Respondent on July 2, 1990.[3] Peckstein and the two other employees named in the Union's discharge

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[3] All dates are in 1990 unless otherwise indicated.

demand [4] joined the strike and the picket line at the Respondent's facility. Held crossed the picket line and continued working.

At this point, the Respondent notified the Union that it intended to terminate Peckstein, Held, and the other two employees pursuant to the Union's June 1989 demand. The Union objected and requested that the Respondent await the arbitrator's decision before acting. Nonetheless, on July 3 the Respondent notified Peckstein and the two other employees that it was acceding to the Union's demand to terminate their employment. It did not terminate Held, however, a fact apparently either unknown by Peckstein at that time or unconfirmed.

On July 6, Peckstein, Scott Westfahl, and one other striking employee[5] visited Held at her home to

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4 The other two employees are Michael Hlavenka and Douglas Owens. The complaint does not allege that the Respondent violated the Act in regard to Hlavenka and Owens.

5 The third employee is Barbara Depies. The complaint does not allege that the Respondent violated the Act in regard to Depies.

solicit her support for the strike, discuss the Respondent's contract offer, and determine whether Held had been discharged by the respondent in response to the Union's June 1989 demand, as had Peckstein. Except for Held's small child, there was no one else at home. It is undisputed that Peckstein did most of the talking during the entire visit. Held informed the group that she had not received a discharge notice. After some 20 or 30 minutes of discussion, Held reiterated her refusal to join the strike. Peckstein responded to Held, "Well, if you valued your life." Peckstein and the other two employees left without further conversation. Held testified that the incident "scared" her and that she did not exactly understand what Peckstein meant by the statement. She reported the threat to a supervisor, to the Respondent's plant manager, and to the police. She then left town for the weekend.

By letter of July 13, the Respondent discharged Peckstein[6] for "serious strike misconduct" without

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6 The Respondent similarly discharged Westfahl, as explicated by the judge. We affirm the judge's decision as to Westfahl for the reasons set forth by the judge.

further explanation, even though it had not rescinded its July 3 discharge notice.

The judge found, and we agree, that the Respondent's professed capitulation on July 3 to the Union's discharge demand was a sham. The judge relied on the Respondent's yearlong resistance to the Union's discharge demand prior to the strike, its subsequent decision to discharge targeted employees who went out on strike at the same time it permitted nonstriking employees to continue working, its failure to explain its selectivity, and its failure to establish that it would have discharged the strikers in the absence of their support for the strike. The judge concluded that the Respondent unlawfully discharged Peckstein because of her union and protected, concerted activity of joining the strike.

We agree with the judge that as of her discharge on July 3, Peckstein was a discriminatorily discharged employee eligible for reinstatement with backpay. The judge correctly held that the Clear Pine Holdings [7] standard for reinstatement of employees

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[7] 268 NLRB 1044 (1984).

accused of strike misconduct does not apply to the alleged misconduct of strikers after they have been discriminatorily discharged. We also agree with the judge that Peckstein's visit to Held's home for the purposes stated was protected, concerted activity. Further, we agree with the judge that Peckstein's closing remark -- "Well, if you valued your life"--- reasonably may be interpreted as a threat of physical harm if Held continued to cross the picket line. Finally, we agree with the judge that the Respondent's purported discharge of Peckstein on July 13 was not a discharge or termination but, rather, a refusal to reinstate. Thus, the issue correctly posed by the judge was whether Peckstein should be denied the usual remedies of reinstatement with backpay by virtue of her conduct during the July 6 visit with Held. The judge concluded that Peckstein's conduct was not so outrageous as to render her unfit for employment. Here we part company with the judge.

In determining whether backpay and reinstatement are appropriate remedies where discriminatees engaged in subsequent misconduct, the Board "looks to the nature of the misconduct and

denies reinstatement in those flagrant cases 'in which the misconduct is violent or of such character as to render the employees unfit for further services'" (C-Town, 281 NLR 458 (1986), quoting J.W. Micro-electronics Corp., 259 NLRB 327 (1981). The Board takes into account whether the misconduct was an "emotional reaction" to the employer's own unlawful discimination against the employee. Blue Jeans Corp., 170 NLRB 1425 (1968), citing NLRB v. M & B Headwear Co., 349 F.2d 170, 174 (4th Cir. 1965).

Here Peckstein and two other strikers confronted Held at her home when no one except Held's small child was nearby. For some 20 to 30 minutes Peckstein attempted to talk Held into changing her mind and joining the strike. Held protested that she could not afford to strike because she had to support her child. When Held remained firm in her decision to refrain from participating in the strike, Peckstein responded, "Well, if you valued your life." As the judge found, Peckstein's statement, "well if you valued your life," may reasonably be interpreted as a threat of physical harm if Held continued to cross the picket line. Finally, it cannot

reasonably be said that Peckstain's threat against held's life, delivered 3 days after Peckstein's discharge, was the kind of emotional reaction, contemplated by the Board in Blue Jeans Corp., supra, and Precision Window Mfg., 303 NLRB No. 141 (July 31, 1991), that would not warrant forfeiture of her reinstatement rights.[8]

We find that by her substantial threat against Held on July 6, particularly under the circumstances of its delivery, Peckstein rendered herself unfit for futher service. Thus, she has forfeited her right to

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8 Surely, Held was not responsible for Peckstein's discharge, and Held did nothing to provoke Peckstein. Unlike the present case, in both Blue Jeans Corp., and Precision Window Mfg., the alleged "threats to Kill" by which it was asserted that employees forfeited their reinstatement rights were, respectively, an "emotional ... temporarly aberration" and a "rambling, semicoherent mix of insult and threat" directed at supervisors while on the employers' premises and were uttered in spontaneous reaction to the employees' discriminatory discharges. Thus, in those cases, the Board concluded that employees did not forfeit their rights to reinstatement. Member Raudabaugh dissented in Precision and would have found the "threat to kill" disqualifying in that case.

reinstatement and backpay after that date. Fiber Glass Systems, 278 NLRB 1255 (1986). We modify the recommended remedy accordingly and adopt the recommended Order as modifed.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Alto-Shaam, Inc., Menomonee Falls, Wisconsin, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified below.

1. Substitute the following for paragraphs 2(a) and (b).

"(a) Offer Scott Westfahl and James Jaeger immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges previously enjoyed, and make them whole for losses they suffered by reason of the discrimination against them, as set forth in the remedy section of the decision.

"(b) Remove from its files any reference to the

terminations of Scott Westfahl and James Jaeger, and notify each of them in writing that this has been done and that evidence of their unlawful termination will not be used as a basis for future personnel actions against them."

2. Insert the following as paragraph 2(c) and reletter the subsequent paragraphs.

"(c) Make Kristeen Peckstein whole, with interest, for any loss of earnings and other benefits suffered as a result of her unlawful discharge on July 3, 1990, until her July 6, 1990 threat directed against Doreen Held."

3. Substitute the attached notice for that of the administrative law judge.

Dated, Washington, D.C. July 24, 1992

Clifford R. Oviatt, Jr., Member

John N. Raudabaugh, Member

NATIONAL LABOR RELATIONS BOARD

(SEAL)

MEMBER DEVANEY, dissenting in part.

Contrary to the majority, I would adopt the judge's finding that the Respondent violated Section 8(a)(3) and (1) of the Act by refusing to reinstate employee Peckstein.[1] Although I do not condone Peckstein's remark to Held, I agree with the judge that it was not of such a serious or flagrant nature as to warrant withholding the Board's traditional reinstatement remedy.

Dated, Washington, D.C. July 24 1992

Dennis N. Devaney, Member

NATIONAL LABOR RELATIONS BOARD

[1] I agree with my colleagues' decision in all other respects.

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT discourage membership in United Steelworkers of America, AFL—CIO—CLC, or any other labor organization, by discharging, terminating, denying reinstatement rights, or otherwise discriminating against employees because of lawful strike, picketing, or other union conduct.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL offer Scott Westfahl and James Jaeger immediate and full reinstatement to their former jobs, or if such jobs no longer exist, to substantially equivalent positions, without prejudice to the seniority or other rights and privileges previously enjoyed, and make them whole, with interest, for losses they suffered by reason of the discrimination against them.

WE WILL remove from our files any reference to the terminations of Scott Westfahl and James Jaeger, and notify them in writing that this has been done and

that evidence of their unlawful termination will not be used as a basis for future personnel actions against them.

WE WILL make Kristeen Peckstein whole for any loss of earnings and other benefits resulting from her unlawful termination on July 3, 1990, and occurring until her July 6, 1990 misconduct.

ALTO-SHAAM, INC.

(Employer)

Dated_____by_____

(Representative) (Title)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, 310 W. Wisconsin Avenue, Suite 700, Milwaukee, Wisconsin 53203-02211, Telephone 414-291-3866.

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD, Petitioner,	)
v.	)
ALTO-SHAAM, INC., Respondent.	)

APPLICATION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

To the Honorable, the Judge of the United States Court of Appeals for the Seventh Circuit:

The National Labor Relations Board, pursuant to the National Labor Relations act, as amended (29 U.S.C. Sec. 151, et seq.), hereinafter called the Act, respectfully applies to this Court for the enforcement of its Order and shows:

(1) The unfair labor practice found by the Board occurred within this judicial circuit in the State of Wisconsin.

(2) On July 24, 1992, upon due proceedings had before the Board in said matter, the Board duly stated its findings of fact and conclusions of law, and issued

an Order directed to the Respondent in Case No. 30-CA-11019.

On the same date, the Board's decision and Order was served upon Respondent by sending copies thereof postpaid, bearing Government frank, by certified mail.

(3) Pursuant to Section 10(e) of the National Labor Relations Act, as amended and pursuant to Rule and pursuant to Rule 17(b) of the Federal Rules of Appellate Procedure, the Board will certify and file with this court a certificate of record of all documents, transcripts of testimony, exhibits and other material comprising the entire record of the proceeding before the Board upon which the said Order was entered, which includes the pleadings, testimony and evidence, findings of fact, concusions of law, and the Order of the Board sought to be enforced.

WHEREFORE, the Board prays this Honorable Court that it cause notice of the filing of this application to be served and that this Court take jurisdiction of the proceeding and of the questions determined therein and make and enter upon the pleadings, testimony and evidence, and the

proceedings set forth in the transcript and upon the Order made thereupon a judgment enforcing the Board's Order.

Aileen A. Armstrong
Deputy Associate General Counsel
NATIONAL LABOR RELATIONS BOARD

Dated at Washington, D.C.
this 11th day of September, 1992

UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD,	)	
	)	
Petitioner	)	Appellate Court No.
v.	)	92-3212
	)	
ALTO-SHAAM, INC.,	)	District Court No.
	)	30-CA-11019
Respondent.	)	

ANSWER TO APPLICATION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

Now comes Alto-Shaam, Inc., by Roland J. Steinle, Jr., its attorney, and for answer to the petition for enforcement filed herein by the National Labor Relations Board on September 14, 1992, respectfully says that the Board's order should not be enforced by this honorable court for the following reasons:

1. The Board's said order is not supported by substantial evidence on the record as a whole, and is contrary to the applicable law.

2. The record affirmatively shows that respondent did not interfere with, restrain, or coerce any employee in the exercise of the rights guaranteed by Section 7 of the National Labor Relations Act.

3. Respondent hereby requests and petitions the Court to vacate and set aside the following portion of the order of the National Labor Relations Board issued on July 24, 1992, wherein it was ordered that respondent offer Scott Westfahl and James Jaeger immediate and full reinstatement to their former jobs, or, if such jobs no longer exist, to substantially equivalent positions, without prejudice to the seniority or other rights and privileges previously enjoyed, and make them whole, with interest for losses they suffered by reason of the discrimination against them.

4. Respondent hereby alleges that it will abide by the portion of such order that will make Kristeen Peckstein whole for any loss of earnings and other benefits resulting from her termination on July 3, 1990, and occurring until her July 6, 1990 misconduct.

5. Respondent, among other things, relies on the provision of section 10 of the National Labor Relations Act, 29 U.S.C. section 160 et seq. and

section 10 of the Administrative Procedure Act, 5 U.S. sec. 1009.

Dated this 30th day of September, 1992.

ROLAND J. STEINLE, JR.,
Attorney for Respondent.

P.O. Address:

1962 N. Prospect Avenue
Milwaukee, WI 53202
(414) 277-8309

JD--144--91

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS
BOARD DIVISION OF JUDGES

ALTO-SHAAM, INC.

and Case 30--CA--11019

UNITED STEELWORKERS OF AMERICA,
AFL—CIO—CLC

Melvin L. Ford, Esq., of
Memphis, TN, for the
General Counsel.
Mr. John Cleveland, of
Brookfield, WI, for the
Charging Party.
Roland Steinle, Esq. and
Mr. James C. Schalow
of Menomonee Falls, WI
for the Respondent

DECISION

Statement of the Case

MARVIN ROTH, Administrative Law Judge: This case was heard at Milwaukee, Wisconsin, on March 7 and 8, 1991. The charge was filed on July 24, 1990 by United Steelworkers of America, AFL--CIO--CLC (herein the "Union").[1] The complaint, which

1 All dates herein are for 1990 unless otherwise indicated.

issued on September 5, alleges that Alto-Shaam, Inc. (herein the "Company" or "Respondent") violated Section 8(a)(3) and (1) of the National Labor Relations Act, as amended. The gravamen of the complaint is that the Company alleged twice terminated employee Kristeen Peckstein, and terminated employees James Jaeger and Scott Westfahl, because of their union and other protected concerted activities. The Company's answer denies the commission of the alleged unfair labor practices, and affirmatively alleges in sum that: (1) the Company initially terminated Peckstein upon demand by the Union, for failure to pay dues;; (2) the three employees engaged in unprotected strike misconduct; (3) the allegations of the complaint should be referred to arbitration ander the Collyer doctrine. On motion of General Counsel, other assertions made by way of affirmative defense were stricken by order of Associate Chief Administrative Law Judge John M. Dyer dated February 22, 1991.

All parties were afforded full opportunity to participate, to present relevant evidence, to argue orally and to file briefs. Upon the entire record in this case [2] and having considered the briefs submitted by General Counsel and the Company, I make the following:

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[2] The official transcript of proceedings is hereby corrected in the following respects:

Page	Line	From	To
119	11	Powell	Paul
156	18	supports	reports

Findings of Fact

I. The Business of Respondent

The Company, a corporation, maintains an office and plant in Menomonee Falls, Wisconsin, where it is engaged in the manufacture and distribution of food service equipment and related products. In the operation of its business, the Company annually purchases and receives at its Menomonee Falls facility, goods valued in excess of $50,000 directly from points outside of Wisconsin. I find, as the Company admits, that it is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

II. The Labor Organization Involved

The Union is a labor organization within the meaning of Section 2(5) of the Act.

III. The Alleged Unfair Labor Practices

A. Background, the Strike, and the Terminations of Peckstein and Westfahl

I. The Facts

At all times material, the Union was the collective-bargaining representative of the Company's factory employees. In 1987, at a time when there was a collective-bargaining contract in effect, several of the unit employees, including Kristeen Peckstein resigned from union membership. The Company and the Union

subsequently executived a contract containing a maintenance of membership clause (Section 3.2), which provided as follows:

> It shall be a condition of employment that all employees covered by this Agreement who are members of the Union in good standing on the effective date of this Agreement, or who thereafter become members of the Union, shall remain members in good standing in the Union as prescribed by the Constitution.

In June 1989 the Union requested that the Company discharge four employees "for their failure to maintain their membership status at least to the extent of paying monthly dues." The employees were Peckstein, Doreen Held (then Doreen Held Yetka), Douglas Owens and Michael Hlavenka. The Company refused, and the Union filed a grievance over that refusal. The Company asserted that its refusal was proper because: (1) the neutrality clause of the contract precluded the Company from granting the Union's request; (2) the Union failed to prove that the employees were union members in good standing as of the effective date of the contract (July 8, 1987) or thereafter became members, and (3) the dues checkoff provisions of the contract were not determinative of the matter. The Union grieved the matter to arbitration. The matter was heard before an arbitrator on May 21, 1990, and the arbitrator set a briefing schedule. Before the parties submitted briefs, the contract expired by its terms (June 30). On Monday, July 2 the Union commenced an economic strike and picketing at the Company's facility. Peckstein, Owens and Hlavenka

joined the strike, but Held crossed the picket line and remained at work. At this point the Company notified the Union of its intention to terminate the employees involved in the grievance. The Union objected, and requested that the Company wait until the arbitrator ruled, and that the employees not be terminated. Nevertheless, by letters dated July 3, the Company notified Peckstein, Owens and Hlavenka that it was acceding to the Union's demands and terminating each of them. The Company did not terminate Held. The strike ended on July 13, when the Union on behalf of all striking employees made an unconditional offer to return to work. Strikers began returning to work on Monday, July 16. Although ostensibly terminated, Owens and Hlavenka returned to work. The Company never rescinded Peckstein's termination. However by letter, dated July 13, the Company notified Peckstein that she was "terminated July 13, 1990 for serious strike misconduct." By letter dated July 23, the Union informed the arbitrator and the Company that it was withdrawing its grievance. In its answer to the present complaint, the Company asserted by way of affirmative defense that the Union's original request for Peckstein's termination was an unfair labor practice because "the real intent was to coerce and intimidate Kristeen Peckstein to pay dues, and to use such situation to attempt to intimidate and coerce other employees by setting a precedent in this matter." In this proceeding, the Company offered no explanation as to why the three strikers, but not Held, were terminated on July 3, or why Owens and Hlavenka were able to return to work when the strike ended, without being rehired.

On July 13 the Company also terminated striking employee Scott Westfahl. Company president Jerry Maahs testified in sum that the Company terminated Peckstein and Westfahl on the basis of a report he received that Peckstein, accompanied by Westfahl and a third striking employee (Barbara Depies) threatened Doreen Held at her home. Depies quit her employment on July 9, before the strike ended. Maahs testified that he was unaware of any other threats by Peckstein or Westfahl. He did not personally speak to Held about the matter.

With regard to the alleged threat, Doreen Held testified in sum as follows: She did not join the strike, and worked on July 2. However she did not work for the balance of that week, because she had no babysitter on July 3, the plant was closed on July 4, and she was on vacation for the balance of the week. On Friday, July 6, at about 4:30 to 5 p.m. Peckstein, Depies and a third employee (whom she did not know but learned to be Westfahl) pulled up into the driveway of her home. Peckstein and Held had been friends. Held went to the window and told them she didn't want any trouble. They said they wanted to talk to her, and she let them in. They remained for some 20 to 30 minutes. Peckstein did most of the talking. She showed Held her termination letter, and asked if Held had received such a letter. Held said she had not, and they told her to check her mailbox. She did, but there was no letter. They asked Held to join the strike. Held said she could not afford to do so. The conversation continued along this line. Finally Peckstein said, "well, if you valued your life." At this point Peckstein said, "let's go," and the three striking

employees left. The conversation broke up between 6 and 6:30 p.m. However, in her affidavit to the Board, Held said the employees left about 7:30 p.m. Held further testified that she called Debra Zimmerman, a friend and Company supervisor, who told her to call plant superintendent Gregory Lamondo. She was not able to reach Lamondo until 8:30 to 9 p.m. He advised her to call the police, which she did. The police arrived at about 9 p.m. and took her report, but she did not make a formal complaint. Held told Zimmerman, Lamondo and the police that Peckstein, but not Depies or Westfahl, threatened her. Later that evening Held went to a friend's home, where she remained for the weekend. Lamondo testified that Held called him about 9 p.m., told him that Peckstein, Depies and Westfahl threatended her, and he advised her to notify the police. The Company did not question or otherwise contact the striking employees or the Union about the matter.

Peckstein, Depies and Westfahl testified in sum as follows: On July 6 they were at the picket line. They decided to go to Held's home to talk to her about honoring the picket line, the Company's offer in negotations, and whether Held received a termination letter. They first had dinner, and then proceeded to a tavern near Held's home, where they thought they might find her. She was not there. They each had a drink with dinner at the tavern, but remained sober. They proceeded to Held's home arriving about 7:30 (Peckstein testified they arrived about 7:30-7:45 p.m., Depies testified that they arrived about 7 p.m., and Westfahl testified they arrived between 7 and 7:30 p.m.). They saw her car in the driveway. Held came

to the window and yelled that she didn't want an argument or a fight. They said they were not there for that, and just wanted to talk about joining the strike. She let them in, and they gathered in the living room where they remained for some 15 to 45 minutes. (Peckstein testified it was 30 to 45 minutes, Depies testified about 30 minutes, and Westfahl testified about 20 minutes). Peckstein did most of the talking. Held's young son immediately befriended Westfahl, and thereafter Westfahl functioned primarily as a babysitter, remaining out of the conversation.[3] Peckstein asked if Held received the same termination letter as did Peckstein, Owens and Hlavenka. Held checked her mailbox and reported that there was no letter. Peckstein and Depies tried to persuade Held to join the strike. They also talked about the Company's offer. Held maintained that she could not afford to join the strike. There was no agreement. The conversation was polite, and there was no yelling.

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3 Held, who was presented as a Company witness, was not questioned about Westfahl's role in the conversation. However, in her investigatory affidavit Held corroborated Westfahl's testimony concerning his lack of involvement. Held stated: "During this time Westfahl said nothing except 'hi' to my son. He simply sat on my couch and played with my son." General Counsel objected to the Company's proffer of the affidavit, and I sustained the objection. Therefore, although I credit Westfahl's testimony concerning his lack of involvement, I have not taken Held's affidavit into consideration in making that determination.

They did not threaten Held, or make the closing remark attributed to Peckstein by Held.

Peckstein applied for unemployment compensation. The Company contested the application on the ground that Peckstein was terminated for misconduct. The Wisconsin Unemployment Compensation Division allowed benefits, holding that: "The first discharge on 7/3/90 is the one that applies for unemployment compensation purposes, not the second one on 7/13/90. An employee cannot be discharged twice without having been rehired in between the discharges. It has not been established the first discharge was for misconduct." The Company did not appeal from this determination.

I credit the testimony of the three striking employees concerning their purpose in visiting Held, and the subject matter of their conversation. Held had already made up her mind not to join the strike, and was not much interested in the details of what Peckstain had to say, including the Company's contract proposal. She admitted in her testimony that her recollection was vague about the details of the conversation. I also find that the striking employees were at Held's home between about 7 and 7:30 p.m. and remained for 20 to 30 minutes. Held's estimate of the timing was plainly erroneous. The strikers could not have arrived between 4:30 and 5 p.m., remained for 20 to 30 minutes, and left between 6 and 6:30 p.m. Moreover, Held stated in her affidavit that they left about 7:30 p.m., which was probably correct. However I credit Held's testimony that Peckstein ended the

conversation by saying "Well, if you valued your life." Held impressed me as a candid person. Held and Peckstein were or had been friends. I find it unlikely that Held would knowingly make a false accusation against Peckstein. Held was also careful to make clear that Depies and Westfahl did not threaten her. In light of Held's testimony, I find that she told the Company that only Peckstein threatened her, and I do not credit Lamondo's testimony that she said all three employees threatened her.

2. Analysis and Concluding Findings

All of the alleged unfair labor practices, i.e., the terminations of Peckstein, Westfahl and Jaeger, occurred at times when there was no collective-bargaining contract in effect between the Company and the Union. Therefore the subject matter did not arise under a contract, and deferral to arbitration is not warranted. Indiana & Michigan Electric Co., 284 NLRB 53, 60 (1987). Moreover, the Company's discharge of Peckstein was a repudiation of the arbitration process then in progress. For this additional reason, deferral would not be warranted.

I find that the Company violated Section 8(a)(3) and (1) by discharging Peckstein on July 3. The discharge was unlawful for several reasons. First, as of July 3 there was no outstanding union request for Peckstein's termination. The parties had agreed to submit the matter to arbitration, and upon being notified of the Company's intention, the Union requested that the Company wait until the arbitrator ruled, and that the Peckstein and the other employees

not be terminated. Therefore the Company had no basis for asserting that it was discharging Peckstein pursuant to a union security agreement. Indeed, as the Company itself argued in the grievance proceeding, the contract contained a neutrality clause which required it to remain neutral with respect to union membership. Instead the Company, acting on its own initiative, discharged Peckstein, ostensibly for her lack of union membership. Such conduct constitutes discrimination in regard to tenure of employment to encourage or discourage membership in a labor organiation. Therefore the Company violated Section 8(a)(3). Second, on the basis of its own assertions, the Company had in the words of the statute, "reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership." In the grievance proceeding the Company argued that the Union failed to prove that Peckstein and the other employees were members in good standing as of July 8, 1987, or became members thereafter, and therefore required to pay dues under the maintenance of membership clause. In its answer to the complaint, the Company asserted in sum that the Union's original demand was arbitrary, discriminatory and unlawful. The Company's position with regard to the employee's obligations, whether or not correct, was reasonable. Having taken that position, the Act required the Company to stay its hand until the matter was resolved through arbitration, or, as happened, the Union withdrew its request. Having failed to do so, the Company violated

Section 8(a)(3). Third, and most fundamentally, I find that the Company's professed capitulation to the Union's demand as a sham and pretext. The Company discharged Peckstein, Owens and Hlavenka because they joined the strike. For over a year the Company stubbornly resisted the Union's request that the employees be terminated for nonpayment of dues. As soon as the three employees demonstrated their support for the Union in joining the strike, the Company suddenly became a champion of compulsory unionism, discharging the three employees in disregard of the Union's request that they not be terminated. However the Company did not terminate Held, who crossed the picket line, and offered no explanation for its selectivity. When the Union abandoned its strike, the Company permitted Owens and Hlavenka to return to work, but professed to again discharge Peckstein. On the basis of the timing of the Company's actions, and its discriminatory action in terminating strikers but retaining the nonstriker, General Counsel presented a prima facie case that the Company discharged Peckstein because of her protected union and concerted activity in joining the strike. In light of the Company's failure to explain and justify its discriminatory pattern of conduct, the Company failed to meet its burden of establishing that it would have terminated Peckstein in the absence of her support for the strike. Therefore, the Company violated Section 8(a)(3) and (1) of the Act.

This brings me to the matter of the second "termination" of Peckstein. I find that Peckstein's closing remark, "Well, if you valued your life," although vague and tentative, could reasonably be

employees did not in fact engage in such misconduct. See, General Telephone Company of Michigan, 251 NLRB 737 (1980), enf'd., 673 F.2d 551 (D.C. Cir., 1981); National Aluminum, Division of National Steel Corp., 242 NLRB 294, 298 (1979). See also, NLRB v. Burnup & Sims, 379 U.S. 21 (1964). In General Telephone Company of Michigan, supra, the Board held with respect to the employer's burden:

> The burden of establishing an "honest belief" of misconduct requires more than the employer's mere assertion that an "honest belief" of such misconduct was the motivating force behind the meting out of discipline. Meeting the burden also requires more than a general statement about the guidelines used in establishing the alleged "honest belief". Rather, it requires some specificity in the record, linking particular employees to particular allegations of misconduct.

The above rules have since been modified in an important substantive respect, with respect to the definition of "misconduct of such a serious character" as to justify denial of reinstatement. In W.C. McQuaide, Inc., 220 NLRB 593, 594 (1975), enf. denied in pertinent part, 552 f.2d 519, 527-528 (3rd Cir., 1977), the Board held in sum that verbal threats by strikers, "not accompanied by any physical acts or gestures that would provide added emphasis or meaning to [the] words," do not constitute serious strike misconduct warranting an employer's refusal to reinstate the strikers. However in Clear Pine Mouldings, 268 NLRB 1044, 1046 (1984), aff'd. 765

F.22d 148 (9th Cir., 1985), the Board rejected this standard, holding instead that the test for determining whether verbal threats by strikers directed at fellow employees justify an employer's refusal to reinstate is "whether the misconduct is such that, under the circumstances existing, it may reasonably tend to coerce or intimidate employees in the exercise of rights protected under the Act."

If the above standards were applicable to Peckstein, I would find that the Company did not violate the Act by terminating her on July 13. On the basis of reports received by Company supervisors, the Company could honestly believe that Peckstein engaged in unprotected strike activity which would justify denial of reinstatement. General Counsel failed to prove that Peckstein did not egage in such misconduct. However, those standards are not applicable to Peckstein. As of July 3, Peckstein's status was that of a discriminatorily discharged employee who was entitled to the usual Board remedies of reinstatement with backpay. The Company's action on July 14 was not a discharge or termination. The Company had already terminated Peckstein. Rather by its July 13 letter the Company in substance refused to reinstate Peckstein. The Michigan Unemployment Compensation Division recognized as much. As the Division correctly held: "An employee cannot be discharged twice without having been rehired in between the discharges". The Company never rehired Peckstein. Therefore the issue presented is whether Peckstein, by reason of her misconduct on July 6, should be denied the usual remedies of reinstatement with backpay for her

discriminatory discharge on July 3. The Board has in some cases exercised its discretion to deny reinstatement to a discriminatee who engaged in outrageous conduct which rendered the employee unfit for employment, where (as here) such misconduct occurred after the disciminatory termination or was unknown to the employer at the time of the termination. See, East Island Swiss Products, 220 NLRB 175 (1975), involving conviction for misappropriating funds, and O.R. Cooper and Sons, 220 NLRB 287 n. 1 (1975), involving intentional destruction of employer's property. The standard for determining whether a discriminatee has engaged in conduct which renders the employee unfit for employment, is much stricter than that for determining whether an employer may refuse to reinstate a current employee by reason of strike misconduct. Coercive misconduct does not per se preclude reinstatement of the discriminatee. In Dalton Telephone Co., 82 NLRB 1001, 1006 (1949), enf'd., 187 F.2d 811 (5th Cir. 1951), the Board held that an unfair labor practice striker (who together with the other strikers had been unlawfully denied reinstatement, was not rendered unfit for reinstatement by reason of the fact that she pleaded guilty to a charge of assault and and battery on a nonstriker). In Virginia Holding Corporation d/b/a The Hotel Roanoke, 293 NLRB No. 16, JD 15 (1989), the Board held that an unfair labor practice striker was entitled to reinstatement, notwithstanding that she told a nonstriker "I'll beat your ass". In Shell Oil Co. v. N.L.R.B., 196 F.2d 637 (5 Cir. 1952), the Court held that proven theft did not preclude reinstatement of a discriminatorily discharged employee.

I find that Peckstein did not engage in strike-related misconduct of such an outrageous character as to render her unfit for employment. Her threat to Held was vague, generalized and unaccompanied by an gesture or act of violence. This was a single, isolated statement. The strike ended a week later, and is long since over. Prior to Clear Pine Moulding, the threat would not have even precluded reinstatement of a currently employed striker who had not been the victim of a discriminatory discharge. Therefore I find that the Company violated Section 8(a)(3) and (1) by refusing to reinstate Peckstein, and that by reason of her unlawful discharge on July 3, she is entitled to the usual remedies of reinstatement with backpay.

With Respect to Westfahl, I find that the Company failed to demonstrate it had an honest belief that Westfahl engaged in serious strike misconduct which would justify denial of reinstatement. The Company knew at most that Westfahl was present when Peckstein made the alleged threat. This alone would not give rise to a good faith belief that Westfahl participated in or was responsible for such misconduct. See, General Telephone Company of Michigan, supra. Assuming that the Company did have a good faith belief, I would find that General Counsel carried its burden of proving that Westfahl did not participate in and was not responsible for the misconduct. Peckstein, Depies and Westfahl agreed that they would visit Held for the purpose of talking to her about joining the strike, the Company's contract proposal, and whether Held received a discharge letter. Such conversation constitutes protected

activity under Section 7 of the Act. They did not agree to threaten her or engage in any other improper conduct. Held invited the three employees into her home. At the end of the conversation Peckstein took it upon herself to make an improper threat. By this time Westfahl had excluded himself from the conversation, was barely listening to what was said, and was substantially engaged in babysitting. He was not responsible for or a party to Peckstein's improper remark. Therefore I find that the Company violated Section 8(1)(3) and (1) by terminating Westfahl.[4]

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[4] North Cambria Fuel Co., 247 NLRB 1408 (1980), enfd. 645 F.d 177 (3rd Cir. 1981) relied upon by the Company (Br. 29), is not in point. In that case the Board found the employer had reason to believe that all of the participating pickets (except one who left before the misconduct began), were involved in rock throwing, and General Counsel failed to prove that any of them did not engage in such misconduct. Buffalo Concrete, 276 NLRB 839, 842 (1985), rev'd. in pertinent part, 803 F.2d 1333, 1340 (4th Cir. 1986), cited by General Counsel (Br. 18), is also distinguishable on its facts,. In that case, a striker, Johnson, was present when another striker assaulted a nonstriker. While this conduct was occurring, Johnson told another striker, "Don't get on the radio." The Court, in disagreement with the Board, found that Johnson thereby associated himself with the assault, and therefore the employer lawfully refused to reinstate Johnson. Unlike the present case, North Cambria and Buffalo Concrete did not involve strikers who were present but demonstrably did not participate in or associate with the improper conduct.

B. Termination of Jaeger

1. Jaeger's discharge, and the events of July 2

Employee James Jaeger joined the strike and participated in the picketing. By letter dated July 13, the Company notified Jaeger that he was terminated as of that date "for serious strike misconduct". Company president Maahs initially testified that Jaeger was terminated "because of an incident involving him claiming that my son", (meaning Company national sales manager, Steve Maahs) "hit him going through the picket line". President Maahs testified that he considered the allegation to be false, and there was no other specific reason for the termination. President Maahs volunteered that there was a pattern of vandalism, with tacks thrown under tires and tires slashed. However, Maahs asserted that Jaeger was not terminated because of other employee's alleged misconduct. After further questioning on the reason for Jaeger's termination, president Maahs added, almost as an afterthought, that part of the incident invclved Jaeger pounding and jumping on Steve Maahs' car.

The incident in question occurred on July 2, the first day of the strike. The Company procured the service of Waukesha County deputy sheriffs in connection with the strike. These deputy sheriffs served on a volunteer basis, after or before their regular work shift. The Company paid them directly at rates negotiated by the Company and the Waukesha County sheriff. They were responsible for keeping the peace on the picket line, maintaining

crowd control, protecting persons and property, and initially, to direct traffic in the plant area. After July 2 the Menomonee Falls police assumed responsibility for directing traffic. However on July 2 there were no municipal police at the strike scene. Deputy Sheriff Paul Renkas testified that he tried to reduce the level of profanity because of the presence of children in the area. He told the Union that he would arrest all of the pickets if they engaged in profanity or suggestive physical gestures. The evidence indicates that at least to some extent the deputy sheriffs acted in accordance with the Company's instructions or request. As will be further discussed, on July 16 (after the strike ended) the Company summoned two deputy sheriffs to be present when Jaeger was informed of his discharge. The complaint does not allege, nor is it necessary to determine whether the deputy sheriffs acted as Company agents. However, as the Company presented two deputy sheriffs as witnesses in connection with the Jaeger termination, I find it necessary to consider the weight to be accorded their testimony by reason of their status as deputy sheriffs. As trained law enforcement officers, I find that their testimony as to objective factors such as distances and dimensions is entitled to particular significance. However, as they were paid directly by the Company, and acted to some extent at the Company's direction, I find that they cannot be regarded as wholly impartial witnesses, in the same sense that I would regard the local police. Therefore on the critical questions of what Jaeger and Steve Maahs did or did not do, I find that their testimony is not entitled to any special weight.

The Company facility is located on Water Street, which is east of the plant, running in a north-south direction. [5] There is a parking lot, normally used by factory employees, located southeast of the facility. South of the facility and factory employees' parking area is a driveway leading to Water Street. The driveway is about 12 to 15 feet wide, reaching a width of about 16 feet at Water Street, i.e., the driveway is wide enough to accommodate two lanes of cars. At the southeast corner of the driveway, where it intersects with Water Street, there is a decorative island, some 3-1/2 to 4-1/2 feet wide and 12 feet long, consisting of a mound covered with rocks and shrubbery. South of the driveway is a parking area normally used by office personnel. Cars here are parked perpendicular to the driveway. There is no barrier between the driveway and the office parking area and the driveway. Cars normally back out and proceed east on the driveway to Water Street. There is another access to Water Street located south of the office parking area. This access was closed during the strike, although some personnel occasionally made use of the access. Factory employees normally worked from 7 a.m. to 3 p.m., although some worked overtime. Office personnel normally worked from 8:30 a.m. until (at least on July 2) shortly before 5 p.m.

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[5] Company counsel prepared a rough diagram of the facility area, which he used in questioning witnesses. However, he minmarked north and south, causing some confusion during cross-examination of General Counsel's witnesses. The diagram was corrected during the testimony of deputy sheriff Renkas, the Company's first witness concerning the Jaeger incident.

On July 2, between 4:30 and 5 p.m., about 20 pickets were gathered at the entrance to the driveway,yelling, shouting, carrying picket signs and marching across the driveway. There were also spectators and two deputy sheriffs (Renkas and Ehlers) on duty. A total of about 30 persons were present in the area of the driveway entrance. At about 4:50 p.m. cars lined up in the driveway preparatory to leaving the facility. The deputy sheriff followed a practice of letting the pickets make one circle of the driveway entrance in front of each exiting vehicle, and then permitted the driver to exit onto Water Street. General Counsel presented three witnesses concerning the incident (Jaeger, union representative Robert Glaser, and Striker Bradley Paul). The Company presented four witnesses concerning the incident (Steve Maahs, deputy Sheriff Renkas, and office personnel Karen Lindberg and Rene Conrad.[6]) As will be discussed, only Jaeger was in a position to see exactly what happened, although Steve Maahs and possibly Conrad were in a position to see part of the incident.[7]

Steve Maahs testified in sum as follows: At about 5 p.m. he pulled out of the office personnel parking area and proceeded down the driveway toward Water Street, about 50 yards away. He was in

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6 Company counsel represented that deputy sheriff Ehlers was unable to testify because of his illness. I have not drawn any inference by reason of his failure to testify.

7 In connection with the incident, "Maahs" refers to Steve Maahs.

a line of cars proceeding on the right (south) side of the driveway. Karen Lindberg was driving in front of him and Rene Conrad in back of him. Cars were parked on both sides of the drivewa,. Lindberg proceeded up to Water Street and there stopped for about three minutes. Maahs stopped behind her. The deputy sheriffs permitted the pickets to circle the driveway entrance. They then directed the pickets to stop. All but one congregated on the left (north) side of the driveway. Jaeger went to the right side near the decorative island. Lindberg proceeded out and south on Water Street, and Maahs moved up to take her place at the head of the line. He remained stopped for 6 to 8 seconds, and the proceeded ahead, intending to turn right on Water Street. At this point, Jaeger, who had a picket sign in this right hand, clenched his left fist, and struck the hood of Maahs' car with that fist. The hood buckled. Maahs later found a slight dent in his car. Jaeger did not make any sudden movement. He was 3 to 6 inches from Maahs' car. Maahs later found a slight dent in his car. Maahs was close to Jaeger because of the large group of pickets on his left. Maahs proceeded away from the plant and said nothing to anyone about the matter until July 5, when he returned to work. At that time he learned that Jaeger complained to the police that Maahs struck him with Maahs' car. On July 10 Maahs, accompanied by Company counsel, gave a written statement to the Menomonee Falls police department. In that statement Maahs said that he did not remember with which hand Jaeger struck his hood. He also said that he did not know if any part of his car struck Jaeger, and did not know that anything happened until he returned to work on July 5. In his investigative

affidavit to the Board's Regional Office, dated August 21, Maahs' stated that Jaeger had a picket sign in his right hand, made a fist with his left hand, and appeared to jump up and slam his left hand into the car's hood. Maahs added that this was the only contact between Jaeger and Maahs' vehicle

Deputy Sheriff Renkas testified in sum as follows: At about 4:50 p.m. cars leaving the facility were as directed, lined up on the right side of the driveway. All cars came from the factory parking area. There were no cars parked in the office parking area. Maahs' was the second or third car in line. The deputy sheriffs permitted the first car to exit, and then the second, as the pickets at this point refrained from marching across the driveway. Maahs' was the next car in line. Jaeger was the only person on the south side of the driveway. Renkas did not recall that Jaeger had a picket sign. Maahs proceeded ahead at less than five miles per hour. At this point Jaeger, who had been about three feet from Maahs' car, made a "surge" or "sudden movement" toward Maahs' car. Renkas, who was watching both sides of the picket line, heard "some type of contact, or thump". Jaeger was not behind Renkas when he heard the thump. Jaeger screamed violently. His body rotated toward the decorative island, and Jaeger jumped up and down on the paved area. Maahs proceeded south on Water Street. Renkas stopped traffic, summoned Jaeger, and turned over traffic direction to deputy sheriff Ehlers. Jaeger yelled that he was hit by Maahs' car. Renkas asked what happened. Jaeger first said that he was hit by the rear bumper, but later said the tire ran over his foot. He said the injury was to the top of his right

foot. Renkas asked if he wanted medical attention. Jaeger was uncertain, although Renkas offered to accompany him to the hospital. Renkas said that if Jaeger was not injured, he could be charged with obstruction of a police officer. Jaeger declined medical attention. Renkas asked to examine Jaeger's foot, and had him remove first his shoe and then his sock. Renkas observed no signs of injury, no marks on the shoe or sock, and only "a sweaty foot with impressions of cotton from the socks on". Renkas was requested to and gave a written statement to the Menomonee Falls police in connection with Jaeger's complaint. Renkas stated: "at approximately 16:55 hrs. I was observing the striking picketers on the north side of the drive. Behind me I heard a car accelerating and a thump. When I turned around I observed the car leaving south on Water Street and (Jaeger) yelling and jumping up and down". Renkas said nothing about Jaeger making a lunge or sudden movement. Renkas' notes of his interview with Jaeger indicated "pain on top of right foot", "run over", and "may have struck on bumper". There was no reference to "tire" or "rear" bumper. I find that Renkas' statement to the police is a more reliable indicator of what he saw and heard than his own prepared testimony in this proceeding. In light of the admissions in his statement, I find that Renkas did not see the incident between Maahs and Jaeger.

Company marketing coordinator Karen Lindberg testified in sum as follows: She was first in line waiting to exit the driveway. Maahs was directly in line behind her, the line being on the right side of driveway. The deputy sheriffs stopped her, and she

remained for about two minutes while the pickets circled the drriveway entrance. When the officers motioned her to proceed, she moved slowly forward and turned left onto Water aireet. She did not know the factory employees, and did not see the incident between Maahs and Jaeger. Rene Conrad, then a Company office employee, testified in sum as follows: Maahs had been parked in the factory employees' lot. She was the third in a line of cars exiting the driveway. The officers permitted the car in front of her to go. At that time there were about two strikers on the right side of the car. As the car proceeded slowly ahead and turned right, one of the strikers "apparently just leaned himself into the car," and then grabbed his leg or knee, saying "I'm hurt". Conrad subsequently testified that the striker "lunged" into the car. Conrad expressed the opinion that the striker was faking an accident, and testified that she did not see any contact between the stiker and the car. She testified that the striker did not hit the car with his fist, and that she never said the striker threw himself on the car. However in her affidavit to the Board's Regional Office, Conrad stated that "the guy who said he got hit threw himself on Steve's car."

James Jaeger testified in sum as follows: On July 2 he arrived on the picket line at about 9 a.m. and remained all day. Cars began leaving at about 5 pm.. They were lined up on the left (north) side of the driveway. There were some 20 to 30 pickets in the driveway area. At the time of the incident, Jaeger was on the south side of the driveway near the decorative island. He was holding a picket sign (poster board on a stick). There were pickets on both sides of the line of cars. However Jaeger could not say how close the

nearest picket was to him. The pickets made a loop and the moved out of the way of the line of cars. A car, which he subsequently recognized as Maahs', pulled out of the office parking area, and proceeded down the south side of the driveway, past the line of cars, accelerated to a speed of about 25 miles per hour, and "caught me in the, my right leg and foot as he went by". The lowest part of the car, near the headlight, possibly the bumper, struck Jaeger's foot and lower leg. The impact knocked Jeager slightly off balance, but he continued to hold his picket sign. Maahs spun his wheels and sped down Water Street without stopping. Jaeger did not strike Maahs' car, although he may have touched the car when he jumped out of the way. As Maahs proceeded down the driveway, Jaeger initially assumed that Maahs would slow down or stop. Jaeger tried to move out of Maahs' way when the car was about fifteen feet away. Jaeger sustained a contusion to the top (instep) of his right foot. He subsequently felt his foot throbbing when he arrived home. The bruised area was purple for about a week. There was initially slight swelling, but no break in the skin. His foot was red, but this may have been from wearing his shoe all day. That evening Jaeger went to a clinic. However he did not describe what if any treatment he received. Jaeger told the deputy sheriff that Maahs hit him with his car. Jaeger did not otherwise describe their conversation. Jaeger also made a report to the Menomonee Falls police.

Union representative Glaser testified in sum as follows: On July 2 he was at the picket line when the incident occurred. He saw a car approaching the driveway. He hear a sound like something hit. He

turned and saw Jaeger "being propelled backward." He did not know whether Jaeger jumped. Striker Bradley Paul's testimony was confused and contradictory. Paul initially testified that at the time of the incident he was close to Jaeger, and that he saw Maahs "backing out of his parking spot heading toward us". Paul subsequently testified that he was on the driver's side of the car, i.e., on the opposite side from Jaeger. Paul variously testified that there no cars lined up in the driveway, that there were a few cars in the driveway, and that no cars exited before Maahs. Paul further testified in sum as follows: He did not see Jaeger hit, and he did not see any contact between the car and Jaeger, because the hood of the car blocked his view. However he heard a thud and saw Jaeger spinning around. Jaeger backed toward the decorative island. Maahs appeared to be driving at about 10 to 5 miles per hour, but not more than 15 miles per hour. In light of the testimony of Glaser and Paul, it is evident that neither saw what actually happened.

Jaeger and Maahs each filed a charge with the Menomonee Falls police department. Jaeger charged that Maahs struck him with his car, and Maahs charged that Jeager made a false report. The police declined to prosecute either charge. The Company failed to present any corraborative evidence to support Maahs' assertion that Jeager slightly dented the hood of his car. The Company presented no photographs of the hood, and Maahs never repaired the alleged damage. As indicated, Maahs admitted that until he learned that Jaeger complained to the police he wa inclined to ignore the whole matter. General Counse.

failed to present any corroborative evidence to support Jaeger's assertion that he sustained a contusion on his foot. No photographs were taken of his foot, and no evidence was presented concerning treatment if any and diagnosis at the clinc. Jaeger authorized release of the clinic's records, and General Counsel had the clinic's report in its possession. However General Counsel did not offer the report in evidence, either independently or through testimony.

There are elements of truth in the testimony of the witnesses. However, I find that none of the witnesses presented an accurate description of what happened. Witnesses for each side contradicted themselves and each other all over the lot. However I find that their collective testimony enables me to determine what probably occurred and what probably did not occur. I find that Jaeger did not dent the hood of Maah's car, slightly or otherwise. As indicated, Maahs' assertion in this regard was totally uncorroborated. His inclination to ignore the matter, and not even mention it, was inconsistent with that assertion. Jaeger was holding a picket sign in one hand, and never let go of the sign. Therefore it is unlikely that he could have struck the car with sufficient force to dent the hood. I further find that Jaeger did not sustain any injury. As indicated, Jaeger's assertion in this regard was totally uncorroborated, Moreover, Jaeger's description of the contact between himself and the car, was inconsistent with injury to the instep of his foot. If Jaeger were struck by the area of the car near the headlight, then any injury would be to his leg, and not the instep of his foot. Moreover, if Maahs were proceeding at 25 miles per hour, then Jaeger probably would have

suffered a fracture or other serious injury, and not merely a minor bruise on his foot. Even if I credited Jaeger's testimony concerning the alleged bruise, it is evident (and even striker Paul conceded), that Maahs must have been proceeding at a relatively low rate of speed.

The evidence indicates that there was considerable congestion and crowding at the driveway exit to Water Street. All of the pickets except Jaeger were congregated on the north side of the driveway. Maahs admitted in his testimony that he tried to avoid the large group of pickets on his left, that he intended to turn right, and that he came within a few inches of Jaeger, who was in a narrow area between the car and the decorative island. Jaeger admitted that he may have touched Maahs' car when he jumped out of the way. Their testimony points the way to the actual facts. I find that Maahs was proceeding in a line of cars exiting from the south side of the driveway. It is unlikely that the deputy sheriffs would direct outgoing traffic to proceed on the left side of the driveway. As Maahs proceeded out the driveway, attempting to avoid the congregated pickets on his left, he unintentially brushed against Jaeger on his right. Jaeger, believing that Maahs tried to run him down, angrily hit the hood of Maahs' car with his fist, but did no damage. This was the noise which the witnesses heard. It is unlikely that the slight impact between Maahs' car and Jaeger's body caused an audible noise. Jaeger, who had been on the picket line all day, easily confused the fatigue pains in his feet with a belief that they were caused by the impact of Maahs' car.

Returning to the testimony of President Maahs, I find in light of that testimony, that the alleged misconduct for which Jaeger was assertedly discharged, consisted of his accusation that Steve Maahs hit him. The Company did not terminate Jaeger because he allegedly pounded or jumped on Steve Maahs' car. If Jaeger did not accuse Steve Maahs of hitting him, the entire incident would have been disregarded. As indicated, Steve Maahs never even intended to mention the incident to anyone. Assuming, arguendo, that Jeager's action in hitting the car played a role in his discharge, I would find that (1) the Company did not have a honest belief that Jaeger engaged in coercive strike misconduct of such a serious nature as to justify denial of reinstatement, and (2) the evidence demonstrates that Jaeger did not engage in coercive strike misconduct. As found, Jaeger, acting in the mistaken belief that Steve Maahs tried to run him down, angrily struck one blow at Maahs' car with his bare fist, doing no damage. Maahs attached no significance to the incident. So far as indicated by the present record, no one other than Maahs saw Jaeger hit his car. As indicated, Rene Conrad testified that she did not see Jaeger hit the car. In these circumstances, Jaeger's spontaneous response cannot be viewed as coercive misconduct which would warrant denial of reinstatement. See and compare: Newport News Shipbuilding Co. v. NLRB, 738 F.2d 1404, 1409-10 (4th Cir. 1984) (employer not justified in terminating striker who forced one departing vehicle to slow down, rapped her fist against the windows of two departing vehicles, and bit and kicked a police officer who tried to arrest her): Pace Oldsmobile, Inc. 256 NLRB 1001, 1011

(1981), enf'd. in pertinent part 681 F.2d 99 (2nd Cir. 1982) employer not justified in denying reinstatement to striker who hit window of employer's showroom without damaging window).

As for Jaeger's charge that Maahs hit him, i.e., the professed reason for Jaeger's termination, the pertinent Board policy was recently restated in Wabeek Country Club, 301 NLRB No. 101, JD at 13 (1991). "Within the area of concerted activities, false and inaccurate statements are protected so long as they are not malicious." Jaeger's allegation did not rise to the level of a maliciously false statement. First the accusation was technically true, because Maahs' car brushed against Jaeger as Maahs exited the driveway. Second, Jaeger had a mistaken although good faith belief that Maahs intentionally struck him, causing injury to his foot. His accusation was not malicious, i.e., it did not constitute "the intentional doing of a wrongful act without just cause or excuse, with an intent to inflict an injury or under circumstances that the law will imply an evil intent." Black's Law Dictionary, 5th Edition, definition of "malice". Therefore Jaeger's accusations that Maahs struck and injured him constituted expressions of opinion in connection with the strike, which are protected activity under Section 7 of the Act. By terminating Jaeger for making these accusations, the Company violated Section 8(a)(3) and (1).

2. The events of July 16, and whether Jaeger is entitled to reinstatement with backpay

As Jaeger was discriminatorily and unlawfully

terminated, he is entitled to the usual remedies of reinstatement with backpay, unless he subsequently engaged in outrageous misconduct which rendered him unfit for employment. The Company contends that by reason of an incident which occured on July 16, Jaeger would not be entitled to those remedies even if his discharge was unlawful.

On Monday, July 16 Jaeger returned to work with other strikers. HIs termination notice arrived in the mail that day. At the time he reported to work he was unaware of his termination. He found his timecard had been pulled. Three witnesses testified concerning the ensuing events: Jaeger, county deputy Sheriff James Materna, and Dennis Jansen, a Company supervisor who is presently in training to succeed plant superintendent Lamondo. Most of the material operative facts are undisputed, although one critical fact is in dispute.

Jaeger testified in sum as follows: Lamondo told him he no longer worked there. Jaeger asked why. Lamondo answered, "because I said so". Jaeger suggested this was no reason. Lamondo asked if he would talk to Company labor relations consultant James Schalow. Jaeger agreed. He waited for about 15 minutes. Lamondo returned with Schalow and two deputy sheriffs. Jaeger asked why he was fired. Schalow answered that he was fired for serious strike misconduct. (In his affidavit to the Board, Jaeger stated that Schalow said he was fired for "serious misconduct on the picket line.") Jaeger asked what he did. Schalow repeated that he was fired, spelling the word. He was yelling. Jaeger asked whether it was

because he was hit by a car. Schalow answered no, that Jeager was a liar, and that he pounded on the car with his fist and picket sign, denting the hood. Jaeger called Schalow a "fat fucking pig". Schalow told Jaeger to leave. Jaeger went for the door, but was grabbed by the deputy sheriifs. They twisted his arm, called him a troublemaker and an asshole, frisked him, including his private parts, and handcuffed him. Jaeger asked why he was arrested. They said because of his vulgar language. Jaeger replied that they called him an asshole. The Menomonee Falls police arrived, and the deputy sheriffs transferred custody of Jaeger to the police. Jaeger was cited for disorderly conduct. Jaeger was convicted and fined $85 for disorderly conduct, specifically, being loud or boisterous in a public or private place. Jaeger was never charged with attempted assault.

Supervisor Jansen testified in sum as follows: On July 16 at about 2:45 p.m. he was present in Lamondo's office. Also present were Jaeger, Lamondo, two other Company personnel and two deputy sheriffs. Schalow arrived a few minutes later. Jaeger came in and asked why he was terminated. Lamondo said he was fired, and would receive a letter. Jaeger again asked why he was fired, Lamondo said he would get Schalow to come and explain the reason. After Schalow arrived there was a discussion which got heated. Jansen put his head down. When he looked up Jaeger was being handcuffed and taken away. Jansen's testimony has no probative value. His testimony concerning the initial conversation between Jaeger and Lamondo was hearsay. That conversation took place at the timeclock. Jansen was not a party to

their conversation. Jaeger was in Lamondo's office because Lamondo arranged for him to meet there with Schalow. As for what transpired between Jaeger and Schalow, Jansen saw and heard nothing or chose not to see or hear anything.

Deputy Sheriff Materna testified in sum as follows: On the afternoon of July 16 he was present in a Company office with the deputy sheriff Brian Gerr, Jaeger, Schalow and 4 or 5 other persons. The Company requested the deputies' presence because"there might be some problems with a party". When the deputies arrived Jaeger and Schalow were talking. Schalow raised his voice toward the end of the meeting. When the deputies arrived Jaeger was being terminated. Schalow told Jaeger at least three times that he was terminated. He spelled the word "fired". Jaeger insisted he was not fired. Schalow requested him to leave. Jaeger said he would not leave, and called Schalow a fat fucking pig. At this point the deputies told Jaeger he should leave. Jaeger said he would not leave until he was ready. Jaeger was seated about six feet from Schalow. He got up, and lunged toward Schalow, with one hand toward Schalow' s throat. The deputies grabbed Jaeger when he was about two feet from Schalow. Jaeger struggled and used profanity toward the deputies. They frisked his entire body, arrested him, and turned him over to the local police. They charged him with disorderly conduct because he was loud and unruly, specifically, because of the profanity he used toward the deputies. Jaeger was not charged with assault or attempted battery.

The only material fact question presented by the events of July 16, concerns what if anything Jaeger did when he arose from his seat. This boils down to a credibility issue between Jaeger and deputy sheriff Materna. Although there were 7 persons in the room besides Jaeger (Schalow, 4 Company personnel and the two officers), the Company presented only two as witnesses to the event. Only Materna professed to see what happened, and only he testified that Jaeger made any kind of threatening physical movement toward Schalow. Lamondo was presented as a Company witness, but was not asked about the July 16 events, although he was involved in those events. Schalow, together with attorney Steinle, presented the Company's case in this proceeding, but did not testify. The Company excused deputy sheriff Gerr as a witness, asserting that his testimony would have been repetitious. Considering that Materna's testimony concerning the matter was totally uncorroborated, the excuse is not persuasive. The Company did not call as witnesses the other two Company personnel who were present. I find that the Company's failure to question Lamondo about the matter, although he was presented as a Company witness, warrants an inference that his testimony would have been unfavorable to the Company. Martin Luther King, Sr. Nursing Center, 231 NLRB 15, n. 1 (1977).

I credit Jaeger's testimony concerning his converstion with Lamondo, which led to the meeting with Schalow. That testimony was contradicted only by Jansen's hearsay testimony. I find, as Jaeger admitted, that he called Schalow a fat fucking pig. I further find that he physically resisted the officers and

swore profusely at them. However I find that he got up to leave, and did not physically threaten Schalow in any way. It is significant that Jaeger was charged only with disorderly conduct by reason of his abusive language toward the officers. If Jaeger had attempted to strike or throttle Schalow, he probably would have been charged with assault or attempted battery. There was no such charge. It is also evident that the officers regarded Jaeger's language toward Schalow as simply an overheated portion of their conversation, and not as a basis for a charge of disorderly conduct. As Jaeger and Schalow were seated in closed proximity, it would have been easy for the officers to mistakenly assume that Jaeger was menacingly heading toward Schalow. Therefore they quickly grabbed Jaeger.

I find that Jeager did not engage in outrageous misconduct which rendered him unfit for employment. First, Jaeger was provoked into using strong language. He was discriminatorily discharged, and not notified of his discharge before returning to work on July 16. Lamondo and Schalow treated him in an insulting and demeaning manner. They acted as if it were none of his business to know the reason or reasons for his termination. Schalow shouted at him and acted as if Jaeger did not know the meaning of the word fired. It is not surprising that Jaeger responded in language common to the factory workplace. Had Lamondo or Scahlow quietly and calmly explained the Company's professed reason for his termination, the meeting would not have taken on the dimension which it did. Jaeger also believed that he was unjustly roughed up and abused by the officers, including

invasion of his private parts, and responded with what he regarded as appropriate language. His behavior in this regard was a matter between himself and the law authorities, and did not render him unfit for employment. His one outburst at Schalow did not constitute grounds for denial of reinstatement and backpay to a discriminatorily discharged employee. In Hit 'N Run Food Stores, 231 NLBR 660, 664, (1977), the Board held that a discriminatee was entitled to full reinstatement notwithstanding that upon her return to work she accused the employer's president of stealing firm funds, and cursed the employer's general manager in language comparable to that used by Jaeger. Hit 'N Run presented a more persuasive case for denial of reinstatement than the present case. In Hit 'N Run, the employee directed her language at high level supervisors with whom she would be in regular contact. In the present case, Jaeger was talking to an outside consultant with whom he normally would not have contact in his work.[8]

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8 NLRB v. National Furniture Manufacturing Co., 315 F. 2nd 280, (7th Cir. 1963), replied upon by the Company (Br. 56-57), did not present a situation comparable to that of Jaeger in the present case. In National Furniture the Court, in disagreement with the Board, held that a discriminatee engaged in a course of conduct which indicated "a basic antagonism" between the employee and the employer "that would preclude future harmonious relations between them". The employee not only repeatedly insulted the employer's general manager, including remarks at the unfair labor

footnote continued

Therefore I find that Jaeger is entitled to the usual remedies of reinstatement with backpay.

Conclusions of Law

1. The Company is an employe engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. By discriminatorily terminating and refusing to reinstate Kristeen Peckstein, Scott Westfahl, and James Jaeger, thereby discouraging membership in the Union, the Company has violated and is violating Section 8(a)(3) of the Act.

4. By interfering with, restraining, and coercing its employees in the exercise of the rights guaranteed in Section 7 of the Act, the Company has engaged, and is engaging, in unfair labor practices within the meaning of Section 8(a)(3) of the Act.

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practice hearing, but also disparaged the employer's business to one of its customers. In the present case Jaeger made one provoked outburst which would not preclude him from the faithful performance of his work. Indeed the Court observed that this was not simply "a conflict of personalities growing out of a disagreement as to labor policies". The instant case presents nothing more.

5. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

The Remedy

Having found that the Company has commited violations of Section 8(a)(1) and (3) of the Act, I shall recommend that it be required to cease and desist therefrom and from like or related conduct, and to take certain affirmative action designed to effectuate the policies of the Act.

Having found that Company discriminatorily terminated and refused to reinstate Kristeen Peckstein, Scott Westfahl and James Jaeger, it will be recommended that the Company be ordered to offer them immediate and full reinstatement to their former jobs, or if such jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges, and make them whole for any loss of their discharge to the date of the Company's offer of reinstatement. I shall further recommend that the Company be ordered to expunge from its records any reference to their unlawful terminations, to give each of them written notice of such expunction, and to inform them that its unlawful conduct will not be used as a basis for further personnel actions against them. See, Sterling Sugars, Inc., 261 NLRB 472 (1982). Backpay shall be computed in accordance with the formula approved in F.W. Woolworth Co., 90 NLRB 289 (1950), with interest as computed in New Horizons for the

Retarded, 283 NLRB 1173 (1987).[9] It will also be recommended that the Company be required to preserve and make available to the Board, or its agents, on request, payroll and other records to facilitate the computation of backpay and reimbursement due.

Upon the foregoing findings of fact and conclusions of law, and upon the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:[10]

ORDER

Respondent Alto-Shaam, Inc., its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

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9 Under New Horizons, interest on and after January 1, 1987 is computed at the "short-term Federal rate" for the underpayment of taxes as set out in the 1986 amendment to 26 U.S.C. § 6621.

10 In the event no exceptions are filed as provided in Section 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Section 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

(a) Discouraging membership in United Steelworkers of America, FLFL-CIO-CLC, or any other labor organization, by discharging, denying reinstatement rights or otherwise discriminating against employees because of lawful strike, picketing or other union activity.

(b) In any like or related manner interfering with restraining, or coercing employees in the exercise of their rights under Section 7 of the Act.

2. Take the following affirmative action which is found necessary to effectuate the policies of the Act:

(a) Offer Kristein Peckstein, Scott Westfahl and James Jaeger immediate and full reinstatement to their former jobs, or if such jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges previously enjoyed, and make them whole for losses they suffered by reason of the discrimination against them as set forth in the section of this Decision entitled "The Remedy".

(b) Expunge from its files any reference to the terminations of Kristeen Peckstein, Scott Westfahl and James Jaeger, and to notify each of them in writing that this has been done and that evident of their unlawful termination will not be used as a basis for future personnel actions against them.

(c) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security

payment records, timecards, personnel records and reports, and all other records necessary to anlayze the amount of backpay due.

(d) Post at its Menomonee Falls, Wisconsin place of business, copies of the attached notice marked "Appendix."[11] Copies of said notice on forms provided by the Regional Director for Region 30, after being duly signed by Respondent's authorized representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to insure that said notices are not altered, defaced, or covered by any thter material.(e) Notify the Regional Director for Region 30, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply therewith.

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11 In the event that the Board's Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall be changed to read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

(e) Notify the Regional Director for Region 30, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply therewith.

Dated, Washington, D.C. 22 May 1991

MARVIN ROTH
Administrative Law Judge

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

ALTO-SHAAM, INC.

and Case 30-CA-11019

UNITED STEELWORKERS OF AMERICA, AFL-CIO-CLC

ORDER

Subsequent to my Order to show cause, counsel for general Counsel reaffirmed his Motion and Respondent filed a statement of position.

General Counsel seeks the dismissal of the affirmative defenses set forth in paragraphs 6, 16, 17, 18 and 19 of Respondent's answer.

Paragraph 6 admits the termination of Kristeen Peckstein on July 3, 1990, but asserts it was made at the request of the Charging Party under the then extant contract with the Union for failure to pay union dues. Respondent asserts that subsequently the Union demanded reinstatement of all parties terminated under such provision. Respondent's answer asserts that the unions action amounted to an

unfair labor practice but admits in its response it did not file charges. I take Respondent's statement to mean that it does not wish to establish its defense as an unfair labor practice but maintains that the July 3, 1990, discharge was at the union's request. On that basis I will not strike this defense.

Paragraph 16 alleges that striking employees acted on behalf of the union or with its acquiescense in performing asserted unprotected activities. General Counsel acknowledges that the activities of the named employees is an issue in the case but that whether the union encouaged or acquiesced is not. Respondent agreed that it filed no charges against the union.

The issue of employee misconduct is in issue in this case since reinstatement would be a normal remedy if there is a violation. However, the question of the Union's asserted acquiesence or misconduct is not, and is not relavent to this trial. The subject matter of Respondent answer paragraph 16 is not relavent or material to the issues in the Complaint and the Motion to strike it is granted.

Paragraph 17 raises the qeustion whether the issues here should be submitted to arbitration under the Collyer doctrine. General Counsel asserts that

Respondent has not demonstrated that the Complaint issues would be covered in the present contract, since they occurred after expiration of the former contract and the alleged misconduct occurred while the employees were on strike. He adds that there is no agreement between the parties to arbitrate the issues.

Respondent asserts that the Peckstein discharge of July 3, which is an essential part of the case, occurred during the previous contract and was based on the contract and that in such instances grievances and arbitraton obligations survive the contract. Respondent appears to have an arguable position and being unaware of the positions of all the parties to the contract, I will not strike this affirmative defense.

Answer paragraphs 18 and 19 attack the Region's investigation and review of this case, with Respondent asserting that the Complaint should be dismissed. General Counsel asserts that these allegations are untrue and irrelevant and immaterial to the trial of this case. Respondent argues authority for its position, but its citation in view of the whole matter is unpersuasive.

Where Respondent has a complaint concerning

case handling, such is an administrative matter for it to address to the General Counsel. This issue has no place in this trial since the ultimate question is whether there is sufficient evidence to establish the complaint.

I strike answer paragraphs 18 and 19.

So Ordered.

John M. Dyer, Associate Chief
Administrative Law Judge

Dated: February 22, 1991

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*** THIS SECTION IS CURRENT THROUGH
P.L. 102-137, APPROVED 10/28/91 ***

TITLE 29 - LABOR

CHAPTER 7. LABOR MANAGEMENT RELATIONS

NATIONAL LABOR RELATIONS

29 USCS @ 160 (1992)

@ 160. Prevention of unfair labor practices

(a) Powers of Board generally. The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8 [29 USCS @ 158] affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise: Provided, That the Board is empowered by agreement with any agency of any State or Territory to cede to such agency jurisdiction over any cases in any industry (other than mining, manufacturing, communications, and transportation except where predominantly local in character) even though such cases may involve labor disputes affecting commerce, unless the provision of the State or Territorial statute applicable to the termination of such cases by such

agency is inconsistent with the corresponding provision of this Act [29 USCS @@ 151-158, 159-168]) or has received a construction inconsistent therewith.

(b) Complaint and notice of hearing-Answer-Court rules of evidence inapplicable. Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated agent or agency, at a place therein fixed, not less than five days after the serving of said complaint: Provided, That no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made, unless the person agrieved thereby was prevented from filing such charge by reason of service in the armed forces, in which event the six-month period shall be computed from the day of his discharge. Any such complaint may be amended by the member, agent, or agency conducting the hearing or the Board in its discretion at any time prior to the issuance of an order based thereon. The person so complained of shall have the right to file an answer to the original or amended complaint and to appear in person or otherwise and give testimony at the place and time fixed in the complaint. In the discretion of the member, agent, or agency conducting the hearing or the Board, any other

person may be allowed to intervene in the said proceeding and to present testimony. Any such proceeding shall, so far as practicable, be conducted in accordance with the rules of evidence applicable in the district courts of the United States under the rules of civil procedure for the district courts of the United States, adopted by the Supreme Court of the United States pursuant to the Act of June 19, 1934 (U.S. C., title 28, secs. 723-B, 723-C) [see 28 USCS @ 2072].

(c) Reduction of testimony to writing-Findings and order of Board. The testimony taken by such member, agent, or agency or the Board shall be reduced to writing and filed with the Board. Thereafter, in its discretion, the Board upon notice may take further testimony or hear argument. If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act [29 USCS @@ 151-158, 159-168]: Provided, That where an order directs reinstatement of an employee, back pay may be required of the employer or labor organization, as the case may be, responsible for the discrimination suffered by him: And provided further, That in determining whether a complaint shall issue alleging a violation of section 8(a) (1) or section 8(a)(2)

[29USCS @ 158(a)(1),(2)], and in deciding such cases, the same regulations and rules of decision shall apply irrespective of whether or not the labor organization affected is affiliated with a labor organization national or international in scope. Such order may further require such person to make reports from time to time showing the extent to which it has complied with the order. If upon the preponderance of the testimony taken the Board shall not be of the opinion that the person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and order dismissing the said complaint. No order of the Board shall require the reinstatement of any individual as an employee who has been suspended or discharged, or the payment to him of any back pay, if such individual was suspended or discharged for the cause. In case the evidence is presented before a member of the Board, or before an examiner or examiners thereof, such member, or such examiner or examiners, as the case may be, shall issue and cause to be served on the parties to the proceeding a proposed report, together with a recommended order, which shall be filed with the Board, and if no exceptions are filed within twenty days after service thereof upon such parties, or within such further period as the Board may authorize, such recommended order shall become the order of the Board and become effective as therein prescribed.

(d) Modification of findings of orders prior to filing record in court. Until the record in a case shall have been filed in a court, as hereinafter provided, the

Board may at any time upon reasonable notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any finding or order made or issued by it.

(e) Petition to court for enforcement of order-Proceedings-Review of judgment. The Board shall have power to petition any court of appeals of the United States, or if all the courts of appeals to which application may be made are in vacation, any district court of the United States, within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall file in the court the record in the proceedings, as provided in section 2112 of title 28, United States Code [28 USCS @ 2112]. Upon the filing of such petition, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or, in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the Court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a

whole shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that the such additional evidence is material and that there wee reasonable ground for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its member, agent, or agency and to be made a part of the record. The Board may modify its findings as to the facts, or make new findings, by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which findings with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive, and shall file its recommendations, if any, for the modification or setting aside of its original order. Upon the filing of the record with it the jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate United States court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States upon writ of certiorari or certification as provided in section 1254 of title 28 [28 USCS @ 1254].

(f) Review of final order of Board on petition to court. Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any United States court of appeals in the circuit wherein the unfair labor practice in question was alleged to

have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith transmitted by the clerk of the court to the Board, and thereupon the aggrieved party shall file in the court the record in the proceeding, certified by the Board, as provided in section 2112 of title 28, Unites States Code [28 USCS @ 2112]. Upon the filing of such petition, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e) of this section, and shall have the same jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board; the findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall in like manner be conclusive.

(g) Institution of court proceedings as stay of Board's order. The commencement of proceedings under subsection (e) or (f) of this section shall not, unless specifically ordered by the court, operate as a stay of the Board's order.

(h) Jurisdiction of courts unaffected by limitations prescribed in 29 USCS @@ 101-110, 113-115. When granting appropriate temporary relief or a restraining order, or making and entering a decree enforcing,

modifying, and enforcing as so modified, or setting aside in whole or in part an order of the Board, as provided in this section, the jurisdiction of courts sitting in equity shall not be limited by the Act entitled "An Act to amend the Judicial Code and to

define and limit the jurisdiction of courts setting in equity, and for other purposes," approved March 23, 1932 (U.S.C., Supp. VII, title 29, secs. 101-115). [29 USCS @@ 101-110, 113-115].

(i) [Repealed]

(j) Injunctions. The Board shall have power, upon issuance of a complaint as provided in subsection (b) charging that any person has engaged in or is engaging in an unfair labor practice, to petition any United district court, within any district wherein the unfair labor practice in question is alleged to have occurred or wherein such person resides or transacts business, for appropriate temporary relief or restraining order. Upon the filing of any such petition the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper.

(k) Hearings on jurisdictional strikes. Whenever it is charged that any person has engaged in an unfair labor practice within the meaning of paragraph (4)(D) of section 8(b) [29 USCS @ 158(b) (4)(D)], the Board is empowered and directed to hear and determine the dispute out of which such unfair labor practice shall

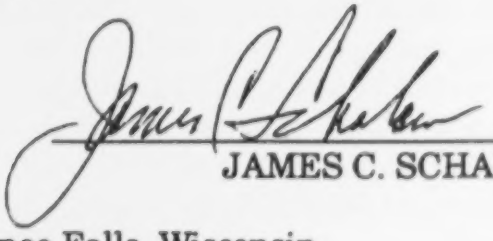
have arisen, unless, within ten days after notice that such charge has been filed, the parties to such dispute submit to the Board satisfactory evidence that they have adjusted, or agreed upon methods for the voluntary adjustment of the dispute. Upon compliance by the parties to the dispute with the decision of the Board or upon such voluntary adjustment of the dispute, such charge shall be dismissed.

(1) Boycotts and strikes to force recognition of uncertified labor organizations-Injunctions-Notice-Service of process. Whenever it is charged that any person has engaged in an unfair labor practice within the meanings of paragraph (4) (A), (B), or (C) of section 8(b) or section 8(e) or section 8(b)(7)[29 USCS @ 158(b)(4)(A), (B), (C)(e), (b)(7)], the preliminary investigation of such charge shall be made forthwith and given priority over all other cases except cases of like character in the office where it is filed or to which it is referred. If, after such investigation, the officer or regional attorney to whom the matter may be referred has reasonable cause to believe such charge is true and that a complaint should issue, he shall, on behalf of the Board, petition any United States district court within any district where the unfair labor practice in question has occurred, is alleged to have occurred, or wherein such person resides or transacts business, for appropriate injunctive relief pending the final adjudication of the Board with respect to such matter. Upon the filing of any such petition the district court shall have jurisdiction to grant such injunctive relief or temporary restraining order as it deems just and

proper, notwithstanding any other provision of law: Provided further, That no temporary restraining order shall be issued without notice unless a petition alleges that substantial and irreparable injury to the charging party will be unavoidable and such temporary restraining order shall be effective for no longer than five days and will become void at the expiration of such period: Provided further, That such officer or regional attorney shall not apply for any restraining order under section 8(b)(7) [29 USCS @158(b)(7)] if a charge against the employer under section 8(a)(2) [29 USCS @ 158(a)(2)] has been filed and after the preliminary investigation, he has reasonable cause to believe that such charge is true and that a complaint should issue. Upon filing of any such petition the courts shall cause notice thereof to be served upon any person involved in the charge and such person, including the charging party, shall be given an opportunity to appear by counsel and present any relevant testimony: Provided further, That for the purposes of this subsection district courts shall be deemed to have jurisdiction of a labor organization (1) in the district in which such organization maintains its principal office, or (2) in any district in which its fully authorized officers or agents are engaged in promoting or protecting the interests of employee members. The service of legal process upon such officer or agent shall constitute service upon the labor organization and make such organization a party to the suit. In situations where such relief is appropriate the procedure specified herein shall apply to charges with respect to section 8(b) (4)(D) [29 USCS @ 158(b)(4)(D)].

CERTIFICATE OF SERVICE BY MAIL

This is to certify that on September 24, 1993 the undersigned duly served the Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit, Alto-Shaam, Inc., Petitioner, (with amended required short appendix) Brief on Arleen A. Armstrong, Collis Suzanne Stocking and Joan Hoyte, attorneys for the National Labor Relations Board, Respondent, by then depositing in the United States Mail at Menomonee Falls, Wisconsin, first class with proper postage thereon prepaid, three (3) copies of the said brief and appendix at their office address as listed below, and upon the office of the Solicitor General of the United States at the address listed below.



JAMES C. SCHALOW

Dated at Menomonee Falls, Wisconsin
this 24th day of September, 1993

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